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2491
No. 11705

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of
Quartz Crystal Products Co., a limited partnership
composed of Raymond I. Biggy, John W. Buol and
James F. Collins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 14 1947

PAUL P. O'BRIEN,
CLERK

No. 11705

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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817 H. W. Hellman Building

354 South Spring Street

Los Angeles 13, Calif.

For Appellee:

CHARLES A. THOMASSET

319 Story Building

610 South Broadway

Los Angeles 14, Calif. [1*]

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the
Southern District of California
Central Division

No. 44274-Y

In the Matter of QUARTZ CRYSTAL PRODUCTS
CO., a Limited Partnership, RAYMOND I. BIGGY,
JOHN W. BUOL, and JAMES F. COLLINS, sole
general partners,

Bankrupt.

To the Honorable Judge of the District Court of the
United States for the Southern District of Cali-
fornia:

The Petition of Raymond I. Biggy, John W. Buol and
James F. Collins, sole general partners, in the City of
San Andreas, County of Calaveras, State of California,
by occupation a, and employed
by (or engaged in the business of
mining), respectfully represents:

1. Your petitioner has had his principal place of
business (or has resided, or has had his domicile) at
San Andreas, California (Long Beach, California), with-
in the above judicial district, for a longer portion of
the six months immediately preceding the filing of this
petition than in any other judicial district.

2. Your petitioner owes debts and is willing to sur-
render all his property for the benefit of his creditors,

except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that it may be adjudged by the court to be a bankrupt within the purview of said Act.

RAYMOND I. BIGGY

JOHN W. BUOL

JAMES F. COLLINS

Petitioners

BURKE MATHES

Attorney for Petitioners

[Verified.]

[Endorsed]: Filed Feb. 25, 1946. [2]

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on February 25, 1946, the respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 44,274-Y.

Title of Proceedings Quartz Crystal Products Co., a limited copartnership, composed of Raymond I. Biggy, John W. Buol, and James F. Collins.

Filed 2-25-46.

Referee Hubert F. Laugharn, Esq., Los Angeles, Calif.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Feb. 25, 1946. [3]

[Title of District Court and Cause]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Leon R. Yankwich, Judge of the
United States District Court for the Southern Dis-
trict of California, Central Division:

I, Hubert F. Laugharn, Referee in Bankruptcy to
whom the above entitled matter has been referred, do
hereby certify as follows:

On the 28th day of January, 1947, an order was made
herein upon the Petition in Reclamation of the U. S.
Machinery Company. In the said Petition in Reclama-
tion the said petitioner sought possession of certain ma-
chinery and equipment in the possession of the Trustee.
The said order of January 28, 1947 determined that the
said personal property was an asset of the bankrupt
estate, that the said petitioner was not entitled to pos-
session thereof, and that there was owing by the petitioner
to the Trustee herein the amount of \$1,331.85.

That within the time as provided by the provisions of
the Bankruptcy Act and the Rules of this Court, a Peti-
tion for Review [4] was filed upon behalf of the said
U. S. Machinery Company.

The order sought to be reviewed herein determined
that two certain agreements in writing dated November
10, 1944, and not recorded until December 18, 1944,
were invalid under Section 2980 of the Civil Code of
the State of California.

The petitioner's entire grounds for review are set
forth in Paragraph II of its review:

"That petitioner alleges that each of said agree-
ments was executed on December 14, 1944, and re-

corded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is erroneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner."

It would seem therefore that the question for consideration herein, in so far as the petitioner is concerned, is whether or not the contracts were "executed" on December 14, 1944. If so, then it might be argued that the recordation of the contracts on December 18, 1944 would comply with the provisions of the said Section 2980.

At the conclusions of the hearings herein, I made and filed a Memorandum Opinion which sets forth in full the details of the problem presented herein and the reasons for my ruling.

I place very little weight upon the testimony of the witness produced by Mr. Henry, who is presumed to have been with Mr. Henry at a time when he went into a service station and executed the contracts upon a date fixed as December 14, 1944. The contracts were prepared on November 10, 1944, down payments were made and the property was delivered. I found that the contracts were executed by the buyers on November 14, 1944 and were mailed to the office of the seller on that day. As to the "execution" of the agreement, to comply with the said Section 2980 of the Civil Code it was my [5] opinion that this should in any event be presumed to be either on November 14, 1944, or in any event only two or three days thereafter.

Otherwise to defeat the terms of the section the seller could deliver the property, receive the consideration and then withhold the actual signing of the instrument for a year and it might be argued that there was no violation of the said section because of non-recording within the time prescribed by the section after execution.

The within review appears to be directed solely to the question of the date of execution of the lease or title retaining contracts in relation to the date of recording thereof. The trustee in effect adopted the contracts and the Findings and the Order of January 28, 1947 determine that the U. S. Machinery Company had been paid more than its unpaid balance thereon.

I understand from counsel for the petitioner for review herein that certain portions of the transcript of the evidence pertaining to the "execution" of the agreements of November 10, 1944 by Mr. Henry for the U. S. Machinery Company will be secured from the reporter and presented to the Judge herein.

In compliance with the provisions of Section 39a(8), I attach to this Certificate the following:

- (1) Petition for Order to Show Cause and Restraining Order.
- (2) Order to Show Cause and Restraining Order.
- (3) Answer to Petition for Order to Show Cause and Restraining Order.
- (4) Petition to Reclaim Property.
- (5) Order to Show Cause.
- (6) Amended Petition for Order to Show Cause.
- (7) Order Authorizing Amendment to Petition for Order to Show Cause, etc.

- (8) Memorandum of Opinion and Direction for Further Hearing. [6]
- (9) Order to take testimony of Peter de Michelis and Joe W. Zwinge together with Interrogatories to be Propounded to Pete de Michelis on behalf of U. S. Machinery Company; Cross Interrogatories to be Propounded to Pete de Michelis on behalf of Trustee; Interrogatories to be propounded to Joe W. Zwinge, Sheriff, Calaveras County, California, on behalf of the Trustee, and Cross-Interrogatories to be Propounded to Joe W. Zwinge, Sheriff of Calaveras County, California, on behalf of U. S. Machinery Co.
- (10) Answers to Interrogatories propounded to Peter De Michelis on behalf of U. S. Machinery Company.
- (11) Copy of Writ of Attachment.
- (12) Testimony of Joe W. Zwinge, Sheriff.
- (13) Memorandum Opinion.
- (14) Findings of Fact, Conclusions of Law, and Order re U. S. Machinery Company, et al.
- (15) Notice.
- (16) Petition for Review of Referee's Order.
- (17) Trustee's Exhibits 1 to 16 inclusive (except Exhibit 10 consisting of various bills from J. E. Coberly Inc. re repairs to car).
- (18) Reporter's Transcript.

Dated: February 28, 1947.

Respectfully submitted,

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed [illegible].

[Endorsed]: Filed Feb. 28, 1947. [7]

[Title of District Court and Cause]

PETITION FOR ORDER TO SHOW CAUSE AND
RESTRAINING ORDER

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy for the Above-Entitled Bankrupt Estate:

The verified petition of William I. Heffron respectfully represents to the Court as follows:

I.

That he is the duly appointed, qualified and acting Receiver for the estate of the above-named bankrupt.

II.

That among the assets and effects of this estate coming into the possession and under the control of your Receiver is certain machinery, fixtures and equipment consisting of mining machinery, a portion of which is described as follows:

Trommel and screen, 5'x35', incl. steel base, trunnions and drive chains,

7" Centrifugal water pump, direct connected to 30 HP Motor (this unit is now connected by V-belt drive, V-pulleys and V-belts property of Company),

Stacher and belt - 100 ft. of light steel fabricated frame 100' 24" wide 5 ply conveyor belt. Tail and head pulleys, troughing rolls and idlers installed in frame, [8]

Tractor and bulldozer - Cat. 60, with 10' blade, Flexible coupling unit for pump and motor.

That in addition to the foregoing there is considerable other miscellaneous equipment, all valued in excess of \$18,000.00.

III.

That prior to the appointment of your Receiver there was heretofore filed in the Superior Court of the State of California, in and for the County of Calaveras, case No. 3152, entitled "J. T. Evans vs. Quartz Crystal Products Co." wherein there was issued and levied out of said Court a writ of attachment; that by virtue thereof, the Sheriff of Calaveras County, to wit: Joe W. Zwinge, has taken over constructive custody of the personal property of the above-named bankrupt.

IV.

That subsequent to the filing of the aforementioned action, there was filed a complaint on claim and delivery by the U. S. Machinery Company against the above-named bankrupt, being cases No. 3171 and No. 3172. That in said action they have deposited a bond in the sum of \$5,000.00 and are attempting to remove the following described property:

- 1 60 Caterpillar Tractor No. PA-3361,
- 1 Byron Jackson Pump and Motor.

That your petitioner is informed and believes, and therefore alleges, that the aforementioned property was sold by the said U. S. Machinery Company upon a conditional sales contract, and that there is a balance due on said contract of approximately \$1,968.29. That the said property is valued in excess of \$5,000. That, accordingly, there is a substantial equity in said property for the benefit of creditors of this estate, and that your peti-

tioner proposes to preserve said equity for the benefit of the creditors herein, and to pay off the balance due upon said conditional sales contract when the aforementioned property is sold under an order of this Court. [9]

V.

That all of said actions have been filed within four months of the filing of the bankruptcy proceedings herein, and that the Court herein has exclusive jurisdiction over said property.

VI.

That the Sheriff of Calaveras County State of California, to wit: Joe W. Zwinge, has no beneficial interest in and to the hereinbefore described personal property.

Wherefore, your petitioner prays that an order to show cause be issued and directed against U. S. Machinery Company, Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants, against J. T. Evans, against Pete D'e Michilos, and against Joe W. Zwinge, Sheriff of Calaveras County, State of California, to be and appear before this Court, on a day certain, to show cause, if any they have, why an order should not be made and entered permanently enjoining and restraining said parties, and each of them, from in any wise attempting to remove, transfer, sell, or otherwise dispose of the property hereinbefore mentioned and described, and authorizing the Receiver, or the Trustee, to sell the said property free and clear of any right, title, or interest of the said persons in and to said property, and why a further order should not be made and entered herein ordering and directing that any *and* liens and rights of said persons in and to said property be transferred to the proceeds of said sale.

Petitioner further prays that pending the hearing of the order to show cause herein that the Court herein enter a temporary restraining order enjoining and restraining the said persons from in any wise interfering with your Receiver in taking over said property and enjoining and restraining said persons from in any wise attempting to remove, sell, or transfer said property.

WILLIAM I. HEFFRON

GEORGE T. GOGGIN

Attorney for Receiver [10]

[Verified.]

[Endorsed]: Filed Feb. 28, 1947. [11]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE AND RESTRAINING
ORDER

To U. S. Machinery Company, and to Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants; J. T. Evans; Pete D'e Michilos; and Joe W. Zwinge, Sheriff of Calaveras County, State of California.

Upon reading and filing the verified petition of William I. Heffron, Receiver for the above-entitled bankrupt estate, good cause appearing therefor, and upon motion of George T. Goggin, attorney for said Receiver, and no adverse interests appearing thereat,

It Is Ordered that U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other repre-

sentatives, attorneys or servants, and J. T. Evans, Pete D'e Michilos, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, be and appear before this Court in the courtroom of the Honorable Hubert F. Laugharn, Referee in Bankruptcy, 340 Federal Building, Los Angeles, California, [12] on the 11 day of March, 1946, at the hour of 10 o'clock A. M. thereof, and show cause, if any they have, why an order should not be made and entered herein ordering and directing Joe W. Zwinge, Sheriff of Calaveras County, State of California, to immediately and forthwith release the property held by him under the attachment as set forth in the petition hereto attached, and why he should not immediately vacate the premises of the above-named Bankrupt.

It Is Further Ordered that the U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants, and J. T. Evans, Pete D'e Michilos, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, be, and they are hereby enjoined and restrained from in any wise interfering with the Receiver herein in taking over said property, and they, and each of them, are hereby restrained and enjoined from in any wise attempting to remove, sell, or transfer said personal property set forth and described in the petition hereto attached.

Dated this 1 day of March, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Feb. 28, 1947. [13]

[Title of District Court and Cause]

PETITION TO RECLAIM PROPERTY

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy for the Above Entitled Bankrupt Estate:

The verified petition of U. S. Machinery Company, a corporation, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California and at all times herein mentioned doing business in the State of California.

II.

That on the 25th day of February, 1946, bankrupt above-named filed a voluntary petition herein praying that it be adjudicated bankrupt; that said bankrupt was adjudicated bankrupt on said day; that William I. Heffron was appointed receiver for the estate of [14] the above-named bankrupt on the 27th day of February, 1946, qualified on said day, and ever since has been and now is acting as receiver for the estate of said bankrupt.

III.

That on or about the 10th day of November, 1944, your petitioner and the bankrupt above-named entered into a written agreement of lease in words and figures as follows:

(Here is set forth the contract being Trustee's Exhibit No. 1.)

IV.

That on or about the 10th day of November, 1944, your petitioner and bankrupt above-named entered into another written agreement of lease in words and figures as follows:

(Here is set forth the contract being Trustee's Exhibit No. 2.)

V.

That subsequent to the execution of both of said agreements alleged in paragraphs III and IV, supra, this petitioner delivered, under and pursuant to the terms of said agreements, to the bankrupt above-named all of the property described in said agreements.

VI.

That subsequent to the execution of the agreement alleged in paragraph III, supra, the bankrupt above-named defaulted in the payment of the installment which became
HFL May
due on the 25th day of April, 1945, and in the payment of each and every installment which became due thereafter, and each and every one of said defaults still continue.

VII.

That subsequent to the execution of the agreement alleged in paragraph IV, supra, the bankrupt above-named defaulted in the payment of the installment which became due on the 25th day of April [15] 1945, and in the payment of each and every installment which became due thereafter, and each and every one of said defaults still continue.

VIII.

HFL 21st

That on or about the ~~24th~~ day of February, 1946, this petitioner as plaintiff filed an action in claim and delivery in the Superior Court of the State of California in and for the County of Calaveras, entitled "U. S. Machinery Company, a corporation, plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants," said action bearing No. 3172 on the Register of Actions of the Clerk of said Court; that by said action the immediate delivery to plaintiff of all of the property described in said agreement set forth in paragraph III, supra, and filed a bond therein in the sum of \$5,000.00; that the said Superior Court did thereupon order the immediate delivery to plaintiff in said action, your petition herein, of all of the said property described in said agreement set forth in paragraph III, supra.

IX.

HFL 21st

That on or about the ~~24th~~ day of February, 1946, this petitioner as plaintiff filed an action in claim and delivery in the Superior Court of the State of California in and for the County of Calaveras, entitled "U. S. Machinery Company, a corporation, plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants," said action bearing No. 3171 on the Register of Actions of the Clerk of said Court; that by said action the immediate delivery to plaintiff of all of the property described in said agree-

ment set forth in paragraph IV, *supra*, and filed a bond therein in the sum of \$7,290.00; that the said Superior Court did thereupon order the immediate de- [16] livery to plaintiff in said action, your petitioner herein, of all of the said property described in said agreement set forth in paragraph IV, *supra*.

X.

That William I. Heffron has been appointed trustee herein, and is now the qualified and acting trustee for the estate of the above-named bankrupt; that said receiver and said trustee claim some right, title and interest in and to the property described in said agreements set forth in paragraphs III and IV *supra*; that the said claim of the said receiver and said trustee is without any right whatsoever and said trustee and said receiver have neither right, title nor interest, nor have the bankrupt or the creditors thereof any right, title or interest in and to the said property.

XI.

That under and pursuant to the aforesaid orders in said actions in claim and delivery petitioner has repossessed a portion of said property, that the balance of said property described in paragraphs III and IV, *supra*, is now in the possession of said receiver and trustee, and each of them.

XII.

That petitioner has made demand upon the said receiver for the surrender of possession of said property

and said receiver has failed and refused to comply with said demand.

XIII.

That petitioner, the Lessor in both of said agreements, has expended and incurred by way of attorney's fees, court costs and otherwise, to enforce the said agreements of lease, the payment of rentals due thereunder, and to repossess the property therein described, the sum of approximately \$2500.00, no part of which has been paid and the whole of which is due and owing from said bankrupt. [17]

XIV.

That petitioner is informed and believes and therefore alleges that the property described in the agreements set forth in paragraphs III and IV, supra, has been subjected to attachments issued in that certain action filed in the Superior Court of the State of California, in and for the County of Calaveras, entitled "J. T. Evans vs. Quartz Crystal Products Co."

Wherefore, your petitioner prays that an order to show cause be issued and directed against William I. Heffron, receiver herein, his agent, attorneys and representatives, and against William I. Heffron, trustee herein, his agent, attorneys and representatives, to be and appear before this court on a day certain; to show cause, if any they have, why an order should not be made and entered:

(1) Permanently enjoining and restraining said parties, and each of them, from in any wise attempting to

interfere with the repossession of all of the property described in the agreements set forth in paragraphs III and IV, *supra*, by this petitioner;

(2) Ordering said receiver and said trustee to release and surrender unto this petitioner any of said property which may be in the possession or control thereof;

(3) Decreeing that the said receiver and trustee and bankrupt have neither right, title, nor interest in and to any of the said property;

(4) For the sum expended or incurred in repossessing said property described in the said agreements set forth in paragraphs III and IV, *supra*, and in enforcing said agreements and recovering the rentals due thereunder; and for such other and further relief as may be meet in the premises.

U. S. MACHINERY COMPANY

By Clyde W. Henry, President

Petitioner

CHARLES A. THOMASSET

Attorney for Petitioner [18]

[Verified.]

[Endorsed]: Filed Mar. 29, 1946.

[Endorsed]: Filed Feb. 28, 1947. [19]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

To William I. Heffron, Receiver Herein, and to William I. Heffron, Trustee Herein:

Upon reading and filing the verified petition of the U. S. Machinery Company, a corporation, and good cause appearing therefor and upon motion of Charles A. Thomasset, attorney therefor,

It is ordered that William I. Heffron, receiver herein and trustee herein, be and appear before this court in the court room of the Honorable Hubert F. Laugharn, Referee in bankruptcy, 340 Federal Building, Los An-

geles, California, on the 8 day of ~~March~~ April, 1946, at the
2 P. M.

hour of ~~10 A. M.~~ thereof, and show cause, if any they have, why an order should not be made and entered herein ordering and directing said receiver and said trustee, and each of them, immediately and forthwith to release all of the property [20] held thereby, and described in the agreements of lease set forth in paragraphs III and IV, respectively, in the petition for reclamation of said U. S. Machinery Company, on file herein, which petition is hereto attached, and why an order should not be made herein and entered granting the prayer of said U. S. Machinery Company contained in said petition.

Dated this 29 day of March, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Mar. 29, 1946.

[Endorsed]: Filed Feb. 28, 1947. [21]

[Title of District Court and Cause]

AMENDED PETITION FOR ORDER TO
SHOW CAUSE

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy for the Above-Entitled Bankrupt Estate:

The verified petition of William I. Heffron respectfully represents to the Court as follows:

I.

That he is the duly appointed, qualified and acting Trustee for the estate of the above-named bankrupt.

II.

That heretofore, and while your petitioner was the duly appointed, qualified and acting Receiver herein, he caused a petition for order to show cause and restraining order to be filed in the proceedings herein, and had an order to show cause and restraining order issued thereon on the 1st day of March, 1946. That said order to show cause and restraining order was directed against the U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants, against J. T. Evans, against Pete D'e [22] Michilos, and against Joe W. Zwing, Sheriff of Calaveras County, State of California; that since the filing of said petition, and while the said order to show cause issued thereon was pending before this Court and certain hearings had with respect thereto, that your Trustee has come into possession of certain facts and evidence which your Trustee desires to incorporate as an amendment to

the petition and order to show cause; that your Trustee accordingly amends the said petition for order to show cause and restraining order by adding thereto the following, to wit:

(1) That your Trustee has been informed and believes, and therefore alleges, that the said conditional sales contract dated and executed on November 10, 1944, covering the following described property, to wit:

- 1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller,
- 1 – 100 ft. conveyor, 24", complete with belt
- 1 – Byron Jackson Pump and motor
- 1 – 3-tooth Rooter

was not recorded by the parties to said contract until the 18th day of December, 1944, a period of approximately thirty-eight (38) days after the execution thereof, and that said recordation was made only in Calaveras County, in the State of California, and not in the counties of San Francisco or Los Angeles, being the principal places of business of the U. S. Machinery Company and of the above-named bankrupt. That the said contract, by virtue of the foregoing facts, was invalid and void and of no force and effect as to the creditors and the Trustee of this estate pursuant to the provisions of Section 2980 of the Civil Code of the State of California. That certain creditors of the above named bankrupt had no actual knowledge of the said contract at the time they became creditors of the bankrupt while the said property was in the possession of said bankrupt.

(2) That your Trustee has been informed and believes, and therefore alleges, that the said conditional sales con-

tract, dated and executed on November 10, 1944, covering the following described pro- [23] perty, to wit:

1 – 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

was not recorded by the parties to said contract until the 18th day of December, 1944, a period of approximately thirty-eight (38) days after the execution thereof, and that said recordation was made only in Calaveras County, in the State of California, and not in the counties of San Francisco or Los Angeles, being the principal places of business of the U. S. Machinery Company and of the above-named bankrupt. That said contract, by virtue of the foregoing facts, was invalid and void and of no force and effect as to the creditors and the Trustee of this estate pursuant to the provisions of Section 2980 of the Civil Code of the State of California. That certain creditors of the above named bankrupt had no actual knowledge of the said contract at the time they became creditors of the bankrupt while the said property was in the possession of said bankrupt.

III.

That your Trustee has been informed and believes, and therefore alleges, that all of the equipment hereinabove referred to in paragraph II, sub-paragraphs (1) and (2) thereof, excepting one 3-tooth Rooter, was in possession and on the leasehold property of the above-named bankrupt on the date of the filing of the original petition in bankruptcy herein, to wit: on February 25, 1946. That your petitioner has further been informed and believes, and therefore alleges, that on or about said date, certain of said equipment was removed from the leasehold premises of the above named bankrupt by the U. S. Machinery

Company, its agent or representatives, or a certain one Pete D'e Michilos. That your petitioner is further informed and believes, and therefore alleges, that the said Pete D'e Michilos had no right, title or interest in *and* said property other than a purported bill of sale obtained by him from the U. S. Machinery Company. [24]

IV.

That your petitioner is further informed and believes, and therefore alleges, that two certain claim and delivery actions were filed against the above-named bankrupt by the U. S. Machinery Company on the 21st day of February, 1946. That in said complaints the said U. S. Machinery Company, however, alleged that they were the owners of all of the above described property set forth in sub-paragraphs (1) and (2) of Paragraph II hereof. That said allegations were made by reason of the purported and invalid conditional sales contracts as hereinabove referred to.

V.

That your petitioner is further informed and believes, and therefore alleges, that the said claim of ownership to the above entitled equipment by the said U. S. Machinery Company, as well as by the said Pete D'e Michilos, is merely colorable, and that at the time of this bankruptcy the said above-named bankrupt was possessed of all of those certain goods, wares and merchandise hereinabove set forth, consisting of mining machinery and equipment used for mining purposes upon its leasehold premises at McSorley Ranch, near Mokelumne Hills, California. That your Trustee, under and by virtue of the provisions of the Bankruptcy Act, is the owner and entitled to possession of said property.

VI.

That your petitioner has made demand upon the U. S. Machinery Company and upon Pete D'e Michilos to return all of the machinery and equipment that they have taken from said property, but they have failed to deliver the said property to your Trustee and wrongfully retain possession thereof without color of right.

Wherefore, your petitioner prays that the petition for order to show cause and restraining order heretofore filed as hereinabove referred to be amended as hereinabove set forth, and that an order be made and entered herein authorizing the amendment as herein set forth, and that upon the hearing had before this Court pursuant [25] to the order to show cause and restraining order heretofore issued and served upon the U. S. Machinery Company and Pete D'e Michilos, that the Court make and enter its order adjudging and decreeing that the said U. S. Machinery Company and Pete D'e Michilos have no right, title, claim or interest in and to the machinery and equipment as hereinabove referred to, and that the Trustee herein is the owner and entitled to possession thereof under and by virtue of the provisions of the Bankruptcy Act; and that the Court further adjudge and decree that the purported conditional sales contracts as hereinabove referred to are invalid and void as to the creditors and to the Trustee of this estate, and why a further order should not be made and entered herein ordering and directing the U. S. Machinery Company and Pete D'e Michilos to forthwith turn over, surrender and deliver to the Trustee all of the machinery and equipment heretofore removed by said parties from the property of the above-named bankrupt as hereinabove set forth. Your

Trustee further prays for such other and further relief as may be proper and just in the premises.

WILLIAM I. HEFFRON

Trustee

GEORGE T. GOGGIN

Attorney for Trustee [26]

[Verified.]

[Endorsed]: Filed Apr. 9, 1946.

[Endorsed]: Filed Feb. 28, 1947. [27]

[Title of District Court and Cause]

MEMORANDUM OF OPINION AND DIRECTION FOR FURTHER HEARING

An order to show cause was issued upon the verified petition of the Receiver, William I. Heffron, requiring the U. S. Machinery Company, and Clyde W. Henry, J. T. Evans, Pete De Michelis, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, to show cause why an order should not be made directing the said Sheriff to release certain mining machinery and equipment. The said order restrained the U. S. Machinery Company and Clyde W. Henry, and the said De Michelis, J. T. Evans and Joe W. Zwinge from removing, selling or transferring the said property.

Thereafter, the said William I. Heffron, Receiver, became Trustee and continued the said proceeding as Trustee.

The U. S. Machinery Company filed a verified answer in which it alleged (Par. III, line 23):

“Respondent alleges that there is a balance due from said bankrupt under agreement of lease covering the personal property in said petition described [28] of \$2,472.65 as of the 21st day of February, 1946, plus interest from said date, plus the sum of \$1,888.90 incurred and expended in the enforcement of said lease and the repossession of said property, including attorney’s fees, plus attorney’s fees and costs incurred herein, to wit, \$1,000.00.”

The said U. S. Machinery Company likewise filed an independent “Petition to Reclaim Property” in which it alleges (Par. III, page 2, line 5):

“That on or about the 10th day of November, 1944, your petitioner and the bankrupt above-named entered into a written agreement of lease in words and figures as follows:

(There is then set forth in full the contract covering the 60 Caterpillar Tractor No. PA-3361, with 10 ft. dozer blade.)

Paragraph IV sets forth the making of the contract on the same day covering

- “1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller
- 1 – 100 ft. conveyor, 24”, complete with belt
- 1 – Byron Jackson pump and motor
- 1 – 3-tooth Rooter.”

The said Petition further recites that on February 21, 1946, the said U. S. Machinery Co., as Plaintiff, filed claim and delivery actions on the two said contracts in the Superior Court of Calaveras County. The said Petition thereupon prays that the Trustee be ordered to release the property which remains in his possession and that the Petitioner recover by way of attorney's fees and court costs the sum of approximately \$2,500.00.

An order to show cause was issued thereon against the said William I. Heffron as Receiver and Trustee. [29]

The Trustee filed an amended petition for order to show cause in which he alleged that the said contracts were executed on November 10th, 1944, and were recorded in Calaveras County on December 18, 1944, and that the contracts were invalid and void because they were not also recorded in the counties of San Francisco and Los Angeles, and because they were not recorded within twenty days following execution under Section 2980 of the Civil Code of the State of California.

The said proceedings initiated by the Receiver and the Trustee, and the petition in reclamation of the U. S. Machinery Company were consolidated and heard together.

The personal property with which we are here concerned is "equipment and machinery used for mining purposes" and under Section 2980 of the Civil Code, the contract

"must be acknowledged, or proved and certified, and must be recorded within twenty days after its execution in the office of the Recorder of the county where the buyer -- the lessee or bailee -- resides at the time he executes such contract; -- and a con-

tract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated, otherwise, it shall be void as to the lien or interest of the seller -- against those having no actual knowledge of the contract, lease, or bailment agreement, who became creditors of the buyer -- the lessee or bailee."

The U. S. Machinery Company alleges in both its petition in reclamation and answer that the contracts were entered into on or about November 10, 1944.

Likewise, in its verified complaints in its two claim and delivery actions (Trustee's Exhibit 8) the same date is set forth with the allegation that on or about said date the equipment was delivered [30] to the defendants.

The two contracts, at the foot thereof, show an endorsement,

"Accepted QUARTZ CRYSTAL PRODUCTS CO.
Raymond I. Biggy
James F. Collins
John W. Buol

Dated November 10, 1944."

Mr. Henry testified in part as follows:

"I had put the pressure on the Sacramento office to have this contract drawn right and have it recorded because it had come to my attention that this outfit was not too reliable. I had been told by some of the dealers that it was not too good."

and, with respect to the De Michelis deal, he testified:

“I had requested Mr. De Michelis not to remove the equipment immediately. In fact, I called him after Mr. Biggy was in my office and Mr. Biggy said he would contact Mr. De Michelis and try to make a deal with him. — I believe \$4,750.00 was mentioned as the amount Mr. De Michelis would take to leave the whole equipment there and get his equipment somewhere else. — When Mr. Biggy did not contact Mr. De Michelis, Mr. De Michelis notified me he would have to have the equipment and would hold me responsible to go ahead and deliver it to him.”

and with respect to his original conversation with De Michelis, when the bill of sale was given on January 7th, Mr. Henry testified:

“I showed Mr. De Michelis the contract we had with the Quartz Products Co. and I also showed him a wire from Mr. Biggy, that Mr. Biggy had given up the property.”

(The only telegram introduced in evidence was [31] Trustee's Exhibit 9, dated January, 1946, wherein Biggy informed Henry that he would be in to take up the obligation on Saturday. Biggy denied that he had ever “given up” the property.)

— — “I cannot say, but I think I promised that he could have prompt delivery because it was our equipment. — I gave him a bill of sale as a guaranty that the equipment was mine and that I would make delivery to him — I also explained to him that that was the contract and should there be any

delay that I would not want to be held responsible for it and he acquiesced to that. — I didn't want to obligate ourselves."

(Question: "and you could give back the \$3750?")

"That is correct."

Mr. Henry, of the United States Machinery Co., although he verified ~~to~~ said complaints, petitions and answer, now states that the contracts were not actually

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signed by him until December 1~~2~~, 1944. The tractor and dozer blade were delivered on September 21, 1944. The down payment as required by the contract was made in several payments; the last being a check of \$8.24, dated Nov. 8, 1944, (Trustee's Exhibit 3) cashed on Nov. 10, 1944, the date the contract was prepared by the United States Machinery Co. The first monthly payment of \$193.75 was paid on December 9, 1944.

The property covered by the other contract was delivered in October and November (all by November 21, except a few minor items). The contract was likewise made out on November 10, 1944 and the check of November 18th for \$311.30 (Trustee's Exhibit 3) is marked "Bal. \$311.30, or initial contract payment of \$1,245.32—11/10/44."

Counsel for the petitioner in reclamation, in his presentation of the matter, informed the Court that under the existing regula- [32] tions that it was necessary that there be a one-third down payment on the contract. If this is the reason for delaying the contracts, it appears that the required full down payments were made on No-

vember 8 and November 18 respectively; after those dates there was no further reason for deferring the execution of the contracts.

While the contracts are referred to as "leases", it appears that the sales taxes in the amounts of \$62.50 and \$91.12, respectively, were added into the contracts.

There is a dispute herein as to the date of the "execution" of the contract as that term is used in Section 2980 of the Civil Code. Insofar as the bankrupt copartnership is concerned, it was executed by Biggy on November 10th and by the other two copartners on November 14th. Biggy testified that he mailed the contract on the evening of the same day to the U. S. Machinery Co. at its office at Sacramento, California. Mr. Henry states that his office did not inform him that the contract had been received back from the bankrupt copartnership until a day or so prior to December 14th, and when he got the said notice he went to Sacramento, signed the contract on December 14th and caused it to be recorded on December 18th in Calaveras County.

The evidence does not show that during this long interval there was any call upon the copartnership for the executed contract.

The invoices (Trustee's Exhibits 4 and 5) are dated October 4, 1944 and are marked "Terms—Lease Contract". The contracts were prepared on November 10th. The property under the second contract was delivered,

some

some ~~time~~ prior to the contract, and [^] a few days thereafter; on November 18th, full down payment was made on the second contract.

I determine that the contract was "executed" not later than November 18th, 1944, and it was therefore not recorded until December 18th, 1944, and under Section 2980 of the Civil Code, it was void as to the then existing creditors of the copartnership, and therefore [33] void as to the Trustee herein.

The Certificate of Business (fictitious firm name) produced by the U. S. Machinery Co. (Respondent's Exhibit 1) shows that the address of the three general partners was:

Raymond I. Biggy,
1304 Alameda Street,
Monrovia, California.

John W. Buol,
3625 Falcon Avenue,
Long Beach, California.

James F. Collins,
443 Orange Avenue,
Long Beach, California.

At the hearing I indicated that I was taking the view that the "residence" of the buyer was Calaveras County. At the continued hearing this question of residence may be considered further. *

The two contracts had been in default since April, 1945. Biggy sent a telegram to Mr. Henry stating that he would be in to "take up" the Quartz Crystal Production obligation on Saturday. (January 6, 1946.) However, he was delayed a day or so and had difficulty locating Mr. Henry at his San Francisco address owing to the fact that Mr. Henry had moved and he could not locate the forwarding address. When Mr. Biggy con-

tacted Mr. Henry on the following Tuesday (January 8, 1946), Mr. Henry informed him that he had sold parts of the property to a Pete De Michelis for \$3700.00, and that he could get it back by paying De Michelis \$4700.00. Mr. Biggy testified that Mr. Henry stated to him he had sold the property to De Michelis with the understanding that he might not be able to make delivery of the said property.

The bill of sale to De Michelis, dated January 7, 1946, covered

- 1 Trommel with trunnions, chain, sprocket and thrust roller; [34]
- 1 24-inch Conveyer, complete with belt;
- 1 60 Caterpillar Tractor No. PA3361 with 10 ft. dozer blade.

It appears that De Michelis tried, without success, to the

get [^] a property free from the Sheriff of Calaveras County, who was holding the equipment under an attachment in an action against the bankrupt, and that the Sheriff informed him on the afternoon of February 25th that by telephone or telegram he had received notice of the filing of the bankruptcy, but that he, De Michelis, had not received any "official notice". The bankruptcy proceeding was filed on February 25, 1946, and on the evening of the same day De Michelis removed the tractor and parts of the trommel.

If the respondents desire a finding that any property was removed prior to such notice, they must, at the next hearing, produce further evidence including the testimony or deposition of the Sheriff of Calaveras County.

The United States Machinery Company, on February 21, 1946, filed the claim and delivery actions in which it alleges that it was the owner of and entitled to possession of the property covered by the two contracts; that under the tractor contract \$849.67 was "due and unpaid", and under the trommel contract, \$1628.48 was "due and payable". In the said actions the said plaintiff prayed judgment for recovery of possession or the sums of \$2500.00 and \$3645.00, respectively, the value thereof.

While the contracts provide that "time is of the essence of this lease", it is my view that the bankrupt estate should not be deprived of this property; it has a value of from \$6000.00 to \$9500.00.

In view of the circumstances as related herein, even though the contracts were valid, the equity powers of the bankruptcy Court are adequate to protect the creditors and permit a retention of the property provided the U. S. Machinery Company is repaid the amount due it with interest to date of payment. The question of the allow- [35] ance of costs will be determined at the continued hearing.

At the next hearing, the Trustee must elect to affirm or reject the sale made to De Michelis as that will effect the final result herein. The title to the property which is under the two claim and delivery actions has not heretofore been adjudicated and possession only has been released to the purported owner, the U. S. Machinery Company.

While I am not at this time indicating a finding on the question as to what exact hour on the date of bankruptcy the property was taken from the Sheriff, it is my present impression that all, or at least a majority was

removed after actual notice of the filing of the bankruptcy.

It appears that the bankrupt is entitled to a credit upon the trommel, conveyor and pump contract. The contract calls for a "Byron Jackson" pump; instead, an agriculture pump was delivered. The Trustee contends that therefore the agriculture pump is not under the contract, but I hold that the substitution was agreed upon and the pump as delivered is under the contract. However, the pump was not in working condition, and the bankrupt claims that it should have a credit of \$161.07 for repairs and necessary work upon it to make it perform the work which the U. S. Machinery agreed it would perform. The U. S. Machinery contends that it was not required to give the said credit, and further, that the reasonable or actual cost of repairs was a lesser amount. I find that a credit of \$110.00 should be credited and allowed on the balance due on the said contract.

This matter is therefore restored to the calendar for further hearing on the 13th day of June, 1946, at the hour of 2:00 P. M., at which time all parties may produce such further evidence as they desire in the premises.

Dated this 29 day of May, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed May 29, 1946.

[Endorsed]: Filed Feb. 28, 1947. [36]

[Title of District Court and Cause]

ORDER TO TAKE TESTIMONY OF
PETE DE MICHELIS AND JOE W. ZWINGE

It appearing that the Trustee herein by and through his attorney, George T. Goggin, and the respondent, U. S. Machinery Company, by and through its attorney, Charles A. Thomasset having appeared before the undersigned in open Court and having stipulated that the testimony of Pete de Michelis, a witness on behalf of U. S. Machinery Company and Joe W. Zwinge, Sheriff of Calaveras County, California, a witness on behalf of the Trustee might be taken in the above entitled matter upon written interrogatories and cross interrogatories,

And it appearing that the said witnesses reside in San Francisco, California, and in San Andreas, California, respectively, and good cause appearing therefor,

It Is Ordered That the testimony of Pete de Michelis be taken before any Notary Public or other Officer authorized by law to administer oaths in the City and County of San Francisco, [37] California, upon direct interrogatories and cross interrogatories attached hereto.

It Is Further Ordered That the testimony of Joe W. Zwinge, Sheriff of Calaveras County, California, be taken before any Notary Public or other Officer authorized by law to administer oaths in the Town of San Andreas, California, upon the direct interrogatories and cross interrogatories attached hereto.

It Is Further Ordered That the answers of the said witnesses to the said interrogatories be written verbatim by the Officer before whom the said testimony is taken and that thereafter the said Officer transmit this Order

together with the attached interrogatories and the answers thereto to the undersigned addressed to him at 312 North Spring Street, Los Angeles 12, California, duly signed by the said witnesses and certified by the Officer before whom the testimony is taken.

Dated: July 12, 1946.

HUBERT F. LAUGHARN
Referee in Bankruptcy

[Written]: Duplicate Original

[Endorsed]: Filed Jul. 12, 1946.

[Endorsed]: Filed Feb. 28, 1947. [38]

[Title of District Court and Cause]

ANSWERS TO INTERROGATORIES
PROPOUNDED TO PETER DE MICHELIS ON
BEHALF OF U. S. MACHINERY COMPANY

State of California

City and County of San Francisco—ss.

Peter De Michelis, being first duly sworn, deposes and says:

That as and for answers to the interrogatories propounded to affiant, I hereby give answers to same as follows:

1st Interrogatory: State your name and address.

Answer: Peter De Michelis, 142 Oxford Street, San Francisco, California.

2nd Interrogatory: State the date when U. S. Machinery Company executed a bill of sale in your favor for certain machinery.

Answer: The bills of sale were executed January 7, 1946, and delivered on that day; on my later request, the bills [39] of sale were notarized February 4, 1946.

3rd Interrogatory: Describe the machinery which was the subject of that bill of sale.

Answer: 1—Trommel, including trunnions, chain, sprocket, and thrust roller. 1—100 ft. conveyor, 24", complete with belt. 1—60 Caterpillar Tractor No. PA-361, with 10 ft. dozer blade.

4th Interrogatory: Did you at that time or thereafter ascertain where that machinery was located?

Answer: I ascertained where the machinery was located prior to my purchase.

5th Interrogatory: If your answer to the last interrogatory be in the affirmative, state where the machinery in question was located.

Answer: On the property of the Quartz Crystal Products Co., between San Andreas and Mokelumne Hill.

6th Interrogatory: What did you thereafter do, if anything, with reference to recovering or taking over possession of that machinery.

Answer: Approximately two days after purchasing the equipment from Mr. Henry, Mr. Henry telephoned to me on behalf of Mr. Biggy, stating that Mr. Biggy wanted to buy the machinery from me and had the cash to pay for it. I told Mr. Henry that I had bought the

equipment because I needed it badly, but that if the machinery could be replaced something could be worked out to the advantage of both parties. I was then informed that Mr. Biggy would call to see me, but he failed to do so. I first attempted to obtain possession about January 18, 1946. At that time, J. Barron and I met the caretaker, Mr. Manchini, who gave me a key to get onto the property, but on entering the grounds, I saw the notice posted informing me the machinery was attached—the attachment [40] itemized various pieces of equipment but did not specifically describe the equipment purchased by me from U. S. Machinery, though covered by the phrase, "Any other personal property, equipment or machinery upon said mining ground." I then proceeded to file a third-party claim about February 13, 1946, and had the machinery released to me from the attachment five days later. J. Barron and I then attempted to take possession but found a new chain and lock on the gate over the one that I had a key for. Mr. Manchini refused to give me a key for the second lock, and he stated that he was instructed by Mr. Biggy that if the equipment had not been removed to stop me from moving it. I then went to the U. S. Machinery in San Francisco and demanded the delivery of the machinery, having purchased the machinery in good faith. Mr. Clyde Henry then stated that he would stand behind the sale and hired me as his agent, agreeing to pay all the expenses, and told me to stay on the job until the machinery was recovered. Then on February 21, 1946, a com-

plaint for claim and delivery was filed, bond posted, and the sheriff instructed to take possession. Mr. Manchini was given three days' notice. As no action was taken by Mr. Manchini, the equipment was released to me by the sheriff on the morning of February 25, 1946 in the presence of Mr. Manchini. I immediately started moving the equipment. On the following day about 5:00 p. m., the deputy sheriff appeared on the grounds, stating that the sheriff's office had received a telegram from Biggy stating that he was filing bankruptcy. I asked this deputy sheriff if I should stop moving the equipment and was told that this was not an official order and that the sheriff's [41] office would not recognize it as such. By this time, I had removed the Caterpillar tractor and miscellaneous parts. I continued to dismantle the equipment preparatory to moving it. When the deputy sheriff appeared on the property with the restraining order on or about March 1, 1946, I then turned over the key to the sheriff on his demand and I have moved nothing since then. J. Barron and myself were present all the time, and Mr. C. Roe and Eugene Smith were with us part of the time. This, to the best of my knowledge, is what happened in this situation.

7th Interrogatory: If you were subjected to any expenses in connection with, and if, in addition, you incurred any liability with reference to, securing possession of that machinery, state the nature, extent and amount of those expenses and liabilities.

Answer: Due to my not being able to get delivery of the equipment purchased from the U. S. Machinery Company, my costs were many times greater than the price I paid for the machinery, including such items as demurrage on the property, rental of other equipment, idle labor and losses from not operating the business we had contemplated. Mr. Henry informed me the only matters that would be allowed would be those costs directly connected with recovering the equipment. I did not expect any further trouble after the sheriff released the equipment to me after I had filed my third-party claim, and therefore did not keep accurate records of every move I made by the day or hour, nor a too accurate record of the expenses. However, the expenses, as best as I can figure them out, incurred between January 7 and February 25, 1946, were as follows: [42]

1 man @ \$50.00 per week	\$300.00
1 Chevrolet Truck @ \$75.00 per week	450.00
1 Studebaker Pick-Up Truck @ \$25.00 per week	150.00
10 trips from Railroad Flat to San Andreas, 440 mi. @ 10¢ per mi.	44.00
15 telephone calls	18.63
16 trips from Railroad Flat to San Francisco, 4608 mi. @ 10¢ per mi.	460.80
Notary fees	3.00
Expense account—Mr. De Michelis	50.00
Peter De Michelis, 5 weeks @ \$100.00 per week	500.00

As and for Answer to Cross-Interrogatories, I hereby give answers to same as follows:

1st Interrogatory: State the dates, as well as the time of day and the persons present, in connection with what you did with reference to recovering or taking over possession of the machinery described in the bill of sale from U. S. Machinery Company.

Answer: Answered in 6th Interrogatory.

2nd Interrogatory: State what documents or receipts, if any that you have evidencing the payment of any expenses by you in attempting to secure possession of the machinery.

Answer: Due to the type of expenses incurred, I have no receipts for substantial expenses. The trucks belonged to me, for which I should be compensated at rental rates as they could have been used elsewhere during this period of time.

PETER DE MICHELIS

Subscribed and sworn to before me, this 20th day of July, 1946.

(Seal)

ALICE C. MORSE

Notary Public in and for the City and County of
San Francisco, State of California

[Endorsed]: Filed Jul. 6, 1946.

[Endorsed]: Filed Feb. 28, 1947. [43]

[Title of District Court and Cause]

MEMORANDUM OPINION

The voluntary petition of the above bankrupt was filed February 25, 1946 at 2:40 P. M., and on the same date an order of adjudication was made. On March 1 an order to show cause was issued upon the verified petition of William I. Heffron, Receiver, and thereupon the U. S. Machinery Company, a California corporation, appeared before the court with its verified answer thereto and its independent Petition to Reclaim Property. The said controversy has been in process of litigation since that date.

On May 29, 1946, I made a Memorandum of Opinion and thereupon permitted the parties to have further hearings in the matter. The hearings have been concluded and this long-drawn out controversy has been finally submitted to the Referee for determination. I will not attempt to reiterate the many matters covered in my former Memorandum of Opinion and this Memorandum may be considered a supplement thereto. During the litigation William I. Heffron, Receiver, has succeeded himself as Trustee and has carried on the litigation.

The question involved concerns the rights of the parties under two certain "Agreements to Lease" by which certain mining property and equipment was delivered by U. S. Machinery Company to the debtor. As indicated in my former Opinion, these instruments were in fact conditional sales contracts. [44]

Some of the property covered thereby is still at the mine in Calaveras County which is in possession of the said Trustee and some was removed from the property under the purported resale thereof by the U. S. Ma-

chinery Company to one Pete De Michelis. The U. S. Machinery Company maintains that it had the right to dispose of the said portion of the property and it is contending here that it has the present right to receive the remaining portion thereof. The Trustee contends to the contrary on both points and contends that the said contracts did not provide security protection or retention of title to the said U. S. Machinery Company. And further, if such security or retention of title was so provided by the contracts that, by virtue of credits asserted by the said Trustee, the unpaid balance thereon was paid and the U. S. Machinery Company has no further interest therein.

The Trustee contends that under Section 2980 of the Civil Code that the agreements should have been recorded within twenty days after execution in the office of the recorder of the county where the buyer (lessee) resided at the date he executed the agreements, and further, that they also should have been recorded in the County where the property was situated, and he contends that the said section was not so complied with.

The evidence shows that the agreements bear date of November 10, 1944 (Trustee's Exhibits 1 and 2). The U. S. Machinery Company alleges in both its Petition to Reclaim and its Answer that the agreements were "entered into on or about November 10, 1944." The agreements were recorded December 18, 1944, in the County Recorder's Office, County of Calaveras, State of California. They were not recorded in Los Angeles County where the copartners, constituting the bankrupt, resided. However, for the purposes of the within controversy I have determined that Calaveras County was the "resi-

dence" of the buyer, that is, the said copartnership. The evidence is disputed as to the date of execution. [45]

The tractor and dozer blade were delivered on September 21, 1944. The down payment as required by the contract was made in several payments, the last being a check of \$8.28, dated November 8, 1944 (Trustee's Exhibit 3) cashed on November 10, 1944. The first monthly payment of \$193.75 was paid on December 9, 1944. The property covered by the other contract was delivered in October and November and the check of November 18 for \$311.30 (Trustee's Exhibit 3) is marked "Bal. \$311.30 on initial contract payment of \$1,245.32—11/10/44."

Counsel for the petition in reclamation, in his presentation of the matter, informed the Court that under the existing regulations that it was necessary that there be a one-third down payment on the contract. Mr. Biggy, one of the copartners, testified that he executed the agreements on November 10 and that the other two partners executed the same on November 14. Biggy testified that he mailed the said agreements on the evening of the same day to the U. S. Machinery Company at its office at Sacramento. It appears that there were no notices given to the said buyers that the U. S. Machinery Company had not promptly and in due course received the said agreements through the mail, and the first of the monthly payments were promptly made on the agreements. Mr. Henry, however, testified that from his office in San Francisco he contacted his office in Sacramento on a number of occasions in connection with the agreements, and that his Sacramento office did not inform him that the executed agreements had been received from the purchaser until a day or so prior to December 12. He there-

upon went to Sacramento, executed the said agreements, and caused the same to be recorded December 18, 1944 in Calaveras County.

The question is: When were the said agreements executed? Having in mind the specific requirements of Section 2980 of the Civil Code, the first portion thereof requires the recording within [46] twenty days after execution in the office of the county recorder where the buyer resides at the time he executed such contract, while the latter portion of the section recites that the same "shall also be recorded in every case in the county where the property is situated otherwise, it shall be void. . . ." Even though there may be a question as to whether or not the second recording must be within twenty days to be within the terms of the said statute, it would appear that in any event it should be promptly recorded in the same manner as a chattel mortgage, to be valid and enforceable as to existing creditors. Why the U. S. Machinery Company did not attach its signature to the agreements before December 12 is not clear from the evidence. It had received the down payments as indicated and it had received the first monthly payments on the agreements, yet it now contends that it did not "execute" the agreements within the terms of the said statute until December 12. The purpose of the statute is to give notice to the public, investors, creditors, and others who may deal with the mine operator, by recording the instrument which shows that the mine operator does not completely own the equipment in his possession. The agreements were valid as between the parties even though not recorded. As to them, their agreements were made when the property was delivered and the required down payment was made. That time

might well be considered as the time of "execution" of the agreement. In fact, the U. S. Machinery Company alleges in both its verified Petition to Reclaim and its Answer that the Agreements were "entered into on or about November 10, 1944." If the seller delivered the property and received the agreed consideration, could he for any reason wait for one year before securing the buyer's signature to the contract and placing his own thereon, and then, within the twenty days, record the contract and maintain that there was a proper recording under the statute? I think not. [47]

I must therefore determine that the agreements, under the contemplation of the said statute, were executed more than twenty days prior to the date of recording on December 18, 1944, and since the bankrupt had creditors on November 10, 1944, who are still creditors at the date of bankruptcy herein, the Trustee therefore may insist on the invalidity of the said agreements.

The Trustee makes a further contention that because of the resale by the U. S. Machinery Company of a portion of the said property, that there is no sum owing to the said seller. The facts in connection therewith are as follows: The agreements had been in default for a number of months when Mr. Biggy sent a telegram to Mr. Henry, owner of the U. S. Machinery Company, stating that he would call upon Mr. Henry at his office in San Francisco to "take up" the Quartz Crystal Products obligation on January 6, 1946. However Mr. Biggy was delayed for a day or so and then had difficulty in locating Mr. Henry at his San Francisco address owing to the fact that Mr. Henry had moved, and he could not locate his forwarding address. Mr. Biggy located Mr. Henry on January 8, 1946. When he called upon him, Mr. Henry informed

him that he had sold portions of the property (one trommel with trunnions, chain, sprocket and thrust roller; one 24 inch conveyor, complete with belt; 1 60 Caterpillar Tract No. PA-3361 with 10 ft. dozer blade) on January 7, 1946 to Pete De Michelis for \$3700.00 Henry informed Biggy that he could get the property back from De Michelis for \$4700.00 or a \$1000 bonus. Biggy testified that Mr. Henry stated that he had sold the property to De Michelis with the understanding that he might not be able to make delivery thereof. No notice of forfeiture of the interests of the bankrupt under the agreements was given by the U. S. Machinery Company prior to the attempted sale to De Michelis. The property remained in the bankrupt's possession. It appears that De Michelis tried, without success, to get the property re- [48] leased from the said Sheriff who was holding the property under an attachment in an action which had been brought against the bankrupt.

Thereafter, and on February 21, 1946, the U. S. Machinery Company filed the claim and delivery actions in which it alleges that on that date it was the owner of and entitled to possession of all of the property covered by the two agreements, and that there was then due under the tractor contract \$849.67 and under the trommel contract \$1628.48. In other words, that there was a balance due on the said contracts of \$2478.15. Although at that very time the said U. S. Machinery Company had in its possession the \$3700 paid by De Michelis on January 7, which sale covered, as aforesaid, only a portion of the property. The result being that not only were the contracts paid but the said seller was holding a surplus of \$1221.85. No trial was had upon the said actions and

no order has been made thereon. The said plaintiff is here before the Bankruptcy Court seeking the same relief.

In the said actions, the said U. S. Machinery Company prayed for judgment for recovery of possession, or the sum of \$2500 and \$3645 respectively, or a total of \$6145.

From the testimony herein, I conclude that the value of the property at the date of bankruptcy was from \$6000 to \$9500. The equity power of the Bankruptcy Court should be and is adequate to protect the bankrupt under such a situation as we find here. Forfeitures are abhorred, and in bankruptcy they are indeed the exception to the rule, and relief is given to the Trustee in Bankruptcy who desires to pay in full the balance due upon a contract and retain the property and equity therein for the benefit of the creditors, even though the contract is past due and in default. The same situation should prevail here.

It further appears that no consideration should be given to the costs incurred by the U. S. Machinery Co. in the said [49] actions or its attorney fees in connection with the said actions or the present hearings in the amount of \$500.00 for each action or any amount whatsoever.

In my Memorandum of Opinion of May 29, I found that the bankrupt should have a credit because of repairs and work performed on a portion of the property sold in the amount of \$110.00. There was therefore a balance of \$2368.15 owing to the U. S. Machinery Company and since the Trustee has elected to adopt the said sale made to the said De Michelis, the result is that the U. S. Machinery Company has received its balance of \$2368.15 and is holding for the Trustee herein the amount of \$1331.85.

Therefore the said U. S. Machinery Company has no right, title, interest, lien or claim upon any of the balance of the said property still in possession of the Trustee. The Trustee should release to the said Pete De Michelis the remaining portions of the said property so sold to the said De Michelis, to wit:

1 Trommel with trunnions, chain, sprocket and thrust roller; 1 24 inch Conveyor, complete with belt; 1 60 Caterpillar tractor No. PA 3361 with 10 ft. dozer blade.

as may be still in the possession of the Trustee.

A question exists as to what, if any, property was taken from the mine by De Michelis. However, since the Trustee has adopted the sale to De Michelis this point is of little consequence here.

The Trustee is entitled to an order that the property, other than that sold to De Michelis, is an asset of the bankrupt estate and the U. S. Machinery Company has no right, title, interest or security thereon, and that the Trustee is entitled to judgment against the U. S. Machinery Company in the amount of \$1331.85.

Counsel for the Trustee is directed to prepare findings and order in accordance with the views expressed herein.

Dated: November 15, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Nov. 15, 1946.

[Endorsed]: Filed Feb. 28, 1947. [51]

[Title of District Court and Cause]

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER RE U. S. MACHINERY COM-
PANY, ET AL.

The petition for order to show cause and restraining order filed herein by William I. Heffron, as Receiver for the above-entitled bankrupt, and the amended petition for order to show cause in connection therewith filed subsequently by the said William I. Heffron, as Trustee for the above-entitled bankrupt estate, while the original petition and order to show cause and answer were pending before the Court, and certain hearings had with respect thereto, and the orders to show cause and restraining orders issued thereon against the U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants; J. T. Evans, Pete De Michelis, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, and the petition to reclaim property filed by the U. S. Machinery Company, and the order to show cause issued thereon directed against William I. Heffron, and the answer to the petition for order to show cause and restraining order filed by the U. S. Machinery Company to the petition of William I. Heffron, as Receiver, all coming regularly on [52] for hearing before this Court on various dates, commencing on the 18th day of March, 1946, at the hour of 10:00 o'clock A. M. thereof, and the Receiver and Trustee being represented by his attorney, George T. Goggin, and the U. S. Machinery Company appearing by its attorney, Charles A. Thomasset, and evidence having been introduced, both oral and documentary, and the matter having been continued from time to time there-

after with additional evidence being introduced, and the Court having taken said matters under submission, makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. That the bankrupt, during all of the period of time hereinafter referred to, was engaged in the development, maintenance and operation of a mine located in Calaveras County from which was extracted quartz, crystals, and other minerals.

2. That the bankrupt heretofore, and during the month of September, 1944, entered into two separate and different oral contracts with the U. S. Machinery Company for the purchase and sale of certain equipment and machinery used or to be used for mining purposes.

(a) That on September 22, 1944, the bankrupt paid to the said U. S. Machinery Company the sum of \$100.00 upon one of the contracts covering the purchase of:

- 1 - Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller,
- 1 - 100 ft. conveyor, 24", complete with belt,
- 1 - Byron Jackson Pump and Motor,
- 1 - 3-tooth Rooter.

That thereafter, and on November 10, 1944, the oral contract covering the aforementioned personal property was reduced to a written conditional sales agreement by the U. S. Machinery Company for the total [53] purchase price of \$3,645.00, plus sales tax, and on said date the bankrupt paid to the said U. S. Machinery Company the sum of \$834.02. Said contract was signed by Raymond

I. Biggy, one of the partners of said bankrupt on the same date, and that the other two partners signed and executed the same on November 14, 1944. That on the 14th day of November, 1944, said contract was mailed to the U. S. Machinery Company at its office in Sacramento, California. That said contract was recorded by the U. S. Machinery Company on December 18, 1944, in Calaveras County, in the State of California. That delivery of he said equipment was made in two different loads to the mine of the said bankrupt, the last being on the 16th day of November, 1944.

(b) That on the 26th day of September, 1944, the bankrupt paid to the U. S. Machinery Company the sum of \$625.00 covering the purchase of:

1 - 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

and on the 29th day of September, 1944, the said personal property was delivered to the mine of the bankrupt. That thereafter, and on November 10, 1944, the oral contract covering the aforementioned personal property was reduced to a written conditional sales agreement by the U. S. Machinery Company for the total purchase price of \$2,500.00, plus sales tax. That said contract was signed by Raymond I. Biggy, one of the partners of said bankrupt on the same date, and that the other two partners signed and executed the same on November 14, 1944. That on the 14th day of November, 1944, the said contract was mailed to the U. S. Machinery Company at its office in Sacramento, California. That said contract was recorded by the U. S. Machinery Company on December 18, 1944, in Calaveras County, in the State of California.

3. That the said bankrupt had creditors who had no actual knowledge of the said contracts and who became creditors of the said [54] bankrupt while the said property was in the possession of the said bankrupt and before the said contracts were recorded, and who are still creditors with provable claims filed in the bankruptcy proceedings herein.

4. That the total purchase price, together with the sales tax on the personal property covered by the two contracts as aforesaid amounted to \$6,298.62. That payments were made upon said contracts by the bankrupt in various installments, and that there was at the time of the filing of the bankruptcy proceedings herein a sum due the U. S. Machinery Company by the said bankrupt upon the said contracts of \$2,368.15 and no more.

5. That on or about January 8, 1946, the U. S. Machinery Company informed one of the partners of the bankrupt that it had sold portions of the personal property set forth in the said conditional sales contract on January 7, 1946 to one Pete De Michelis for \$3,700.00; said personal property, however, being in the possession and under the control of the said bankrupt. That said U. S. Machinery Company informed the said partner of the bankrupt that it could get the property back from the said Pete De Michelis by the payment of \$4,700.00, or a \$1,000.00 bonus; that the U. S. Machinery Company stated that it had sold the property to De Michelis with the understanding that it might not be able to make delivery thereof. That the said bankrupt was in default on

the payments under the terms of said conditional sales contract at said time. That no notice of forfeiture, however, of the interest of the bankrupt under the said agreements was given by the U. S. Machinery Company prior to the purported and attempted sale to Pete De Michelis. That thereafter the said Pete De Michelis tried without success to get possession of the said property, and on February 21, 1946, the U. S. Machinery Company filed the claim and delivery actions in the Superior Court of the State of California, in and for the County of Calaveras, alleging that on said date it was the owner and entitled to possession of all of the property covered by the two [55] agreements and that there was then due under one of the contracts the sum of \$849.67, and under the other contract the sum of \$1,628.48, although at that very same time the said U. S. Machinery Company had in its possession the sum of \$3,700.00 paid by the said Pete De Michelis on January 7, 1946.

6. That no trial has been had upon the claim and delivery actions filed by the U. S. Machinery Company in the Superior Court as aforesaid. That said U. S. Machinery Company has filed in the proceedings herein a petition to reclaim the said property and has submitted to the jurisdiction of this Court to try the very same issues.

7. That the Trustee for the above-entitled bankrupt estate has elected to adopt the sale made to the said Pete De Michelis for the sum of \$3,700.00; that after the payment of the balance due to the U. S. Machinery Company as aforesaid from the \$3,700.00 in its possession that there is a balance of \$1,331.85 due the Trustee.

CONCLUSIONS OF LAW

From the foregoing findings of fact the Court makes the following conclusions of law:

1. That the said conditional sales contracts are invalid and void as to the Trustee and the creditors of this estate under and by virtue of the provisions of Section 2980 of the Civil Code of the State of California in that the said contracts were not recorded within twenty (20) days after the execution of said contracts by the bankrupt.

ORDER

From the foregoing findings of fact and conclusions of law the Court herein makes the following order, to wit:

It Is Ordered, Adjudged and Decreed that the conditional sales contracts entered into by and between the U. S. Machinery Company and the above-named bankrupt, bearing date of November 10, [56] 1944, covering the hereinabove described personal property, are invalid and void and of no force or effect upon the Trustee or the creditors of this estate.

It Is Further Ordered that the sale heretofore made covering a certain portion of the above described personal property to Pete De Michelis, for the sum of \$3,700.00, be and the same is hereby approved and confirmed.

It Is Further Ordered that from said sum of \$3,700.00 there be paid upon the account of the U. S. Machinery

Company the sum of \$2,368.15 in full and complete payment of the amount due it by the above-named bankrupt, and

It Is Further Ordered that the said U. S. Machinery Company forthwith pay the balance of the \$3,700.00 that it is holding in its account to the Trustee herein amounting to \$1,331.85.

It Is Further Ordered that the U. S. Machinery Company has no right, title, interest, lien or claim upon any of the personal property still in the possession of the Trustee herein.

It Is Further Ordered that the Trustee release to Pete De Michelis any portion of the personal property sold to the said Pete De Michelis that may still be in the possession of the said Trustee.

It Is Further Ordered that J. T. Evans, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, have no right, title, claim or interest in and to any of the assets of the above-entitled bankrupt, and that the said Trustee may sell any and all of said property free and clear.

Dated this 28th day of January, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 23, 1947.

[Endorsed]: Filed Feb. 28, 1947. [57]

[Title of District Court and Cause]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy:

Your petitioner, U. S. Machinery Company, a California corporation, acting by and through its attorney, respectfully shows:

I.

That on the 28th day of January, 1947, the Honorable Referee above named made an order herein denying the relief sought herein by petitioner as set forth in petitioner's petition for reclamation filed herein on or about March 30, 1946; that by said petition for reclamation petitioner sought possession of certain machinery and equipment leased to the bankrupt above named under two agreements in writing each dated November 10, 1944; that by said order it is decreed that each of the aforesaid agreements is invalid, void and of no force and effect; that the findings of fact upon which said [58] order is based provides that each of said agreements was signed by the above named bankrupt on the 14th day of November, 1944, and recorded on December 18, 1944; that the conclusions of law based upon said findings declares that each of said agreements is invalid and void under the provisions of section 2980 of the Civil Code of the State of California.

II.

That petitioner alleges that each of said agreements was executed on December 14, 1944; and recorded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is erroneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner.

Wherefore, petitioner alleges that the court erred in denying the petition of reclamation of U. S. Machinery Company and your petitioner feeling aggrieved because of such order, respectfully prays that it may be reviewed.

CHARLES A. THOMASSET

Attorney for Petitioner

[Endorsed]: Filed Feb. 24, 1947.

[Endorsed]: Filed Feb. 28, 1947. [59]

[TRUSTEE'S EXHIBIT NO. 1]

San Francisco Office

Los Angeles Office

1162 Bryant Street

707 E. 61st Street

Telephone UNderhill 2977

Telephone ADams 11787

Telephone Main 1015

U. S. MACHINERY COMPANY

Mining Machinery – Contractors Equipment – Shop Tools

1800 Twentieth Street

Sacramento, California

Date November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

1 – 60 Caterpillar Tractor No. PA3361, with
10 ft. dozer blade.

— —
— —
— —

plus \$62.50 sales-tax,
for the term of nine months at a total rental of \$2500.00 /
of which amount \$818.75 is payable at once, and receipt
whereof is hereby acknowledged by the Lessor; and the
balance of \$1,743.75, payable in nine monthly installments

of \$193.75 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or any injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor, and shall not be deemed to be, payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured

against fire to the extent of \$2,500.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay balance of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process of law, the Lessor may at its option, enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee, take possession of said machinery or any part thereof, and thereupon the Lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY

By Clyde Henry

Pres.

Accepted: QUARTZ CRYSTAL PRODUCTS CO.

By Raymond I. Biggy

John W. Buol

James F. Collins

Date Nov. 10/44 [60]

State of California,

County of Sacramento—ss.

On this 12th day of December in the year one thousand nine hundred and forty-four before me.....
.....a Notary Public in and for the County of Sacramento, personally appeared Clyde Henry, known to me to be the President of the corporation that executed the within instrument known to me to be the person whose name is subscribed to the within instrument andduly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

(Seal)

N. W. Hicks

Notary Public in and for the County of Sacramento,
State of California

My Commission Expires 1-11-47

State of California,
County of Los Angeles—ss.

On this 14 day of November, A. D., 1944, before me,
Burke Mathes, a Notary Public in and for said County
and State, personally appeared Raymond I. Biggy, James
F. Collins and John W. Buol, known to me, (or proved to
me on the oath of.....), to be ~~one of the~~ the general
limited
partners of the \wedge partnership that executed the within in-
general
strument, and acknowledged to me that such \wedge partnership
executed the same.

In Witness Whereof, I have hereunto set my hand and
affixed my official seal the day and year in this certificate
first above written.

(Seal)

Burke Mathes

Notary Public in and for said County and State. [61]

Recorded at the Request of U. S. Machinery Co. Dec.
18, 1944 at 51 minutes past 4 o'clock P. M. in Book 32
of Official Records pages 111-112. [Illegible] John
Squellati Recorder By.....Deputy

Fee \$1.50.

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 1. Filed Apr. 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [62]

[TRUSTEE'S EXHIBIT NO. 2]

San Francisco Office
 1162 Bryant Street
 Telephone UNDERhill 2977

Los Angeles Office
 707 E. 61st Street
 Telephone ADams 11787

Telephone Main 1015

U. S. MACHINERY COMPANY

Mining Machinery – Contractors Equipment – Shop Tools
 1800 Twentieth Street
 Sacramento, California

Date November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

- 1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller
- 1 – 100 ft. conveyor, 24", complete with belt
- 1 – Byron Jackson Pump and motor
- 1 – 3-tooth Rooter

— —
 — —
 — —

plus 91.12 sales tax
 for the term of Ten months at a total rental of \$3,645.00 /,
 of which amount \$1,245.32, is payable at once, and receipt
 whereof is hereby acknowledge by the Lessor; and the
 balance \$2,490.80, payable in ten monthly installments of

\$249.08 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or any injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor, and shall not be deemed to be, payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured

against fire to the extent of \$3,645.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay balance of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process of law, the Lessor may at its option, enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee, take possession of said machinery or any part thereof, and thereupon the Lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY

By Clyde Henry

Pres.

Accepted: QUARTZ CRYSTAL PRODUCTS CO.

By Raymond I. Biggy

James F. Collins

John W. Buol

Date November 10/44 [63]

State of California,

County of Sacramento—ss.

On this 12th day of December in the year one thousand nine hundred and forty-four, before me, N. W. Hicks, a Notary Public in and for the..... County of Sacramento, State of California, residing therein, duly commissioned and sworn, personally appeared Clyde Henry, known to me [or proved to me on the oath of.....] to be the President of the corporation that executed the within instrument, and also known to me [or proved to me on the oath of.....] to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in the.....County of

Sacramento, the day and year in this certificate first above written.

(Seal)

N. W. Hicks

Notary Public in and for the.....County
of Sacramento, State of California.

State of California,
County of Los Angeles—ss.

On this 14th day of November, A. D., 1944, before me, Burke Mathes, a Notary Public in and for said County and State, personally appeared Raymond I. Biggy, James F. Collins and John W. Buol, known to me, (or proved to me on the oath of.....),

the general

limited

to be ~~one of the~~ partners of the partnership that executed the within instrument, and acknowledged to me
 general

that such a partnership executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

Burke Mathes

Notary Public in and for said County and State. [64]

Recorded at the Request of U. S. Machinery Co. Dec.
18, 1944, at 50 minutes past 4 o'clock P. M. in Book 32
of Official Records pages 109-110. [Illegible] John
Squellati Recorder By.....Deputy

Fee \$1.50.

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 2. Filed April 8, 1946. Hubert F. Laugharn,
Referee.

[Endorsed]: Filed Feb. 28, 1947. [65]

[TRUSTEE'S EXHIBIT NO. 4]

San Francisco Office
1162 Bryant Street
Telephone Underhill 2977
Los Angeles Office
552 So. Figueroa Street
Telephone Mutual 5405

U. S. MACHINERY COMPANY

Mining—Industrial—Contractors' Equipment

Main Office: 1800 Twentieth Street

Sacramento, California

Telephone 6-6411

Sold To

Our Invoice No. 4774
Quartz Crystal Products Company Date October 4, 1944
P. O. Box 4 Your Order No. Biggy
San Andreas, California Shipped to
Shipped via
Date shipped

Terms: Lease Contract F.O.B.

1 - 60 Caterpillar tractor #PA3361 with 10
ft. dozer blade

\$2,500.00

Sales Tax 62.50

\$2,562.50

Down Payment 818.75

\$1,743.75

Balance payable in 9 monthly payments of \$193.75

[Written]: Dec. 9/44—check #260

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 4. Filed April 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [66]

[TRUSTEE'S EXHIBIT NO. 5]

San Francisco Office
 1162 Bryant Street
 Telephone Underhill 2977
 Los Angeles Office
 552 So. Figueroa Street
 Telephone Mutual 5405

U. S. MACHINERY COMPANY
 Mining—Industrial—Contractors' Equipment

Main Office: 1800 Twentieth Street
 Sacramento, California Telephone 6-6411

Sold To

Quartz Crystal Products Company	Our Invoice No. 4773
P. O. Box 4	Date October 4, 1944
San Andreas, California	Your Order No. Biggy
	Shipped to
	Shipped via
	Date shipped

Terms: Lease Contract F.O.B.

1 - Trommel, complete as inspected, including trunions, chain, sprocket and thrust roller	\$1,200.00
1 - 100 ft. conveyor 24" complete with belt	1,700.00
1 - Byron Jackson Pump and Motor	650.00
1 - 3 tooth rooter	95.00
	<hr/>
	\$3,645.00
Sales Tax	91.12
	<hr/>
	\$3,736.12

1/3 Down Payment 1,245.32

Balance \$2,490.80

Balance payable 10 payments of \$249.08—monthly

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 5. Filed April 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [67]

[TRUSTEE'S EXHIBIT NO. 6]

Friendly Acres Water Co. West Sacramento Water Co.
Brisbane Water Co. Gold Beach Cooperative Utilities
Klamath Water, Light & Power Co.
Point Arena Electric Light & Power Co.

CLYDE HENRY ENTERPRISES

1568 Russ Building
DOuglas 7327

San Francisco, 4, California
December 11, 1945

Mr. Raymond I. Biggy
903 Alta Street
Monrovia, California

Dear Mr. Biggy:

As I have not heard from you regarding the payments
on the equipment I presume your negotiations were not
successful.

As you know, our circumstances make it impossible to hold out any longer so it will be necessary to repossess the equipment.

Sincerely yours,

Clyde Henry

Clyde Henry

CH:MH[68]

December 13, 1945

Mr. Clyde Henry,
1568 Russ Building,
San Francisco, California

Dear Mr. Henry:

Reference is made to your letter of December 11, 1945. Our negotiations for the loan which I wrote you about have been delayed, awaiting an engineer's report, which I am advised, was received yesterday.

As a personal consideration to me, I would appreciate it if you would with-hold any action in the matter of repossessing the equipment for another week, as I am quite confident we will have this matter cleaned up by December 20th.

Thanking you for your indulgence in this matter, I am

Sincerely yours,

RIB:a

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 6. Filed April 8/46. Hubert F. Laugharn, Referee.
[Endorsed]: Filed Feb. 28, 1947. [69]

[TRUSTEE'S EXHIBIT NO. 7]

In the Superior Court of the State of California in and for the County of Calaveras.

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3171.

AFFIDAVIT FOR CLAIM AND DELIVERY

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being first duly sworn, deposes and says:

1. That he is the president of the U. S. Machinery Company, a corporation, the plaintiff above-named.

2. That plaintiff is lawfully entitled to the possession of the property claimed in this action, which is described as follows; to-wit:

1 – Trommel, including trunnions, chain, sprocket, and thrust roller

1 – 100 ft. conveyor, 24", complete with belt

1 – Byron Jackson pump and motor

1 – 3-tooth Rooter [written]: can't locate

3. That said property is wrongfully detained by the [70] defendant herein;

4. That, according to the best knowledge, information and belief of this affiant, the alleged cause of such detention of said property is as follows, to-wit: an invalid claim of right under lease contract now in default.

5. That neither said property nor any part thereof has been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff;

6. That the actual value of said property is \$3,645.00.

Clyde W. Henry

Subscribed and sworn to before me this 21st day of February, 1946.

(Seal)

LAURA E. HUGHES

Notary Public in and for the City and County of
San Francisco, State of California. [71]

No. 107345

GENERAL CASUALTY COMPANY OF AMERICA
Seattle, Washington

Premium Charged for This Bond
Is \$72.90 Per Annum.

In the Superior Court of the.....
County of Calaveras, State of California.

U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins, and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, De-
fendants.

UNDERTAKING ON CLAIM AND DELIVERY OF
PERSONAL PROPERTY
C. C. P., Secs. 512-513-870

Whereas, it is alleged by plaintiff herein, that defend-
ants have in their possession and unjustly detain certain

personal property, belonging to the plaintiff to the possession of which plaintiff is entitled, of the value of Three Thousand Six Hundred Forty-Five and No/100 ----- (\$3,645.00) ----- Dollars

And Whereas, the plaintiff wants the said property delivered to it and by endorsement in writing upon an affidavit filed herein, has ordered the Sheriff of the..... County of Calaveras, to take the said property from defendants

Now, Therefore, the undersigned General Casualty Company of America, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, in consideration of the delivery of said property to the said plaintiff hereby acknowledges itself bound in the sum of Seven Thousand Two Hundred Ninety and No/100 ----- (\$7,290.00) ----- Dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action,for the return of said property to the defendants if return thereof be adjudged, and for the payment to the defendants of such sum as may, from any cause, be recovered against plaintiff.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 21st day of February, A. D., 1946.

GENERAL CASUALTY COMPANY OF AMERICA

By Edith O'Rourke

Edith O'Rourke, Attorney-in-Fact.

Executed in Duplicate.

State of California

City and County of San Francisco—ss.

On this 21st day of February, 1946, personally appeared before me Edith O'Rourke, the Attorney-in-fact of the General Casualty Company of America, with whom I am personally acquainted, who being by me duly sworn,

and county

stated, that *he* resides in the city / of San Francisco, in the State of California; that *he* is attorney-in-fact of the General Casualty Company of America, the corporation described in and which executed the foregoing instrument; that *he* knows the corporate seal of the said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said Company; that *he* signed *his* name thereto as Attorney-in-fact under like authority, and that said authority has not been revoked or rescinded.

Notary Affidavit

Marie H. Stanley

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 20, 1947.

The within undertaking and the sureties thereof are hereby approved.

Dated Feb. 21-46.

Joe W. Zwinge

Sheriff of Calaveras County, Calif. [73]

Louis J. Glicksberg
Albert H. Gommo
One Montgomery Street
San Francisco, California
Attorneys for Plaintiff

In the Superior Court of the State of California in
and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins, and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, Defendants. No. 3171

COMPLAINT IN CLAIM AND DELIVERY

Plaintiff complains of the defendants and for cause of
action alleges:

I.

That plaintiff is not aware of the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants Doe I and Doe II, and, therefore, sues said defendants by such fictitious names, and leave of Court will be asked to amend this complaint to show their true names and capacities when same have been ascertained.

II.

That at all times in this complaint mentioned, the plaintiff, U. S. Machinery Company, was, and *no* is, a corporation legally organized and doing business under the laws of the State [74] of California.

III.

That plaintiff is informed and believes, and upon such information and belief alleges: That the defendants, Raymond I. Biggy, James F. Collins, and John W. Buol, are co-partners to do business under the firm name and style of Quartz Crystal Products Company, whose main office is in the City of San Andreas, County of Calaveras, State of California.

IV.

That on or about the 10th day of November, 1944, the plaintiff was the legal owner and in possession of that certain equipment consisting of the following:

- 1 – Trommel, including trunnions, chain, sprocket and thrust roller;
- 1 – 100 ft. conveyor, 24", complete with belt;
- 1 – Byron Jackson pump and motor;
- 1 – 3-tooth Rooter;

and that on or about said date, the said plaintiff, by a lease contract in writing, a copy of which is attached hereto and marked "Exhibit 'A'," and made a part hereof as though set out in full, delivered the said equipment to the said defendants; that said contract provides for monthly payments.

V.

The said contract provides, in part, that in the event of default by lessee (being the defendants herein) in the performance of this lease, or the failure to pay any of said payments when due, the said lessor (being the plaintiff herein) may at its option enter the property in which the machinery is located and without hindrance, directly

or indirectly, on the part of the lessee, take possession of said machinery or any part thereof, and thereupon the lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the lessor as rental for the use of said machinery [75] during the time that it has been in the custody of the lessee. The lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the lessor to enforce this lease or the payment of said rentals, or to repossess said property as aforesaid.

VI.

That there is *no* due and unpaid the sum of One Thousand, Six Hundred and Twenty-two and 48/100 (\$1,622.48) Dollars on the payments provided by said contract, there having been no installments paid subsequent to April 25, 1945, and that there remains a total unpaid balance due to the plaintiff under the terms of the said contract, including interest, the sum of One Thousand, Six Hundred and Twenty-two and 48/100 (\$1,622.48) Dollars no part of which has been paid.

VII.

That the plaintiff does hereby elect to take immediate possession of the said personal property, and elects that all payments previously made by the purchaser shall be applied as compensation for the depreciation in value and for the use of the said property.

VIII.

That prior to the commencement of this action, oral demand was made upon the defendants for the delivery of the possession of the said equipment to this plaintiff, but

that the defendants have failed, refused and neglected and still fail, refuse and neglect to deliver possession of the said equipment to this plaintiff, or cause the same to be done, and the defendants, without plaintiff's consent, detain the said equipment from the possession of the plaintiff, to plaintiff's damage.

IX.

That neither the said property, nor any part thereof, has been taken for a tax, assessment or a fine, pursuant to [76] statute or seized under an execution or an attachment against the property of the plaintiff, and that the plaintiff is entitled to the immediate possession of the said equipment. That the actual cash value of the said equipment is the sum of Three Thousand, Six Hundred and Forty-five and no/100 (\$3,645.00) Dollars.

X.

That plaintiff has employed an attorney for the prosecution of this action, and the recovery of the possession of the said equipment, and that his reasonable compensation for said services is, and at all times in this complaint mentioned was, the sum of Five Hundred and no/100 (\$500.00) Dollars, which attorneys' fees are provided for in said contract.

XI.

That all of the defendants claim to have some claim, right, or interest in and to the said equipment or in the said contract, but plaintiff avers that such right or claim, if any, is invalid and subordinate to that of plaintiff.

Wherefore, plaintiff prays judgment against the defendants:

1. For the recovery of the possession of said equipment, or for the sum of Three Thousand, Six Hundred and Forty-five and no/100 (\$3,645.00) Dollars, the market value thereof in case recovery cannot be had.

2. For the sum of Five Hundred and no/100 (\$500.00) Dollars as and for attorneys' fees.

3. For costs of suit herein.

4. For such other and further relief as the Court may deem meet and proper.

LOUIS J. GLICKSBERG

ALBERT H. GOMMO, JR.

Per.....

Attorneys for Plaintiff. [77]

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being duly sworn on behalf of the plaintiff corporation in the above-entitled action, says:

That he is the president of said corporation; that he has read the foregoing complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

Clyde W. Henry

Subscribed and sworn to before me this 21 day of February, 1946.

(Seal)

LAURA E. HUGHES

Notary Public in and for the City and County of San Francisco, State of California. [78]

EXHIBIT "A"

U. S. MACHINERY COMPANY

Sacramento, California

November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

- 1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller
- 1 – 100 ft. conveyor, 24", complete with belt
- 1 – Byron Jackson pump and motor
- 1 – 3-tooth Rooter

for the term of Ten months at a total rental of \$3,645.00 plus 91.12 sales tax, of which amount \$1,245.32 is payable at once, and receipt whereof is hereby acknowledged by the Lessor; and the balance \$2,490.80, payable in ten monthly installments of \$249.08 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect,

the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or any injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor, and shall not be deemed to be, payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured against fire to the extent of \$3,645.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay balance [79] of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process

of law, the Lessor may at its own option enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee, take possession of said machinery or any part thereof, and thereupon the Lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY

By CLYDE HENRY, President.

Accepted:

QUARTZ CRYSTAL PRODUCTS CO.

RAYMOND I. BIGGY

JAMES F. COLLINS

JOHN W. BUOL

Date: November 10/44. [80]

In the Superior Court of the State of California in and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3171.

Action brought in the Superior Court of the State of California in and for the County of Calaveras and the complaint filed in the office of the County Clerk of said Calaveras County.

Louis J. Glicksberg

Albert H. Gommo

Attorneys for Plaintiff

The People of the State of California send Greeting to: Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants.

You Are Hereby Directed to Appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the State of California in and for the County of Calaveras, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or plaintiff will apply to the court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the State of California in and for the County of Calaveras this 21st day of February, 1946.

(Seal) JOHN SQUELLATI, Clerk.

By....., Deputy Clerk. [81]

* * * * *

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 7. Filed April 8, 1946. Hubert F. Laugharn, Deputy.

[Endorsed]: Filed Feb. 28, 1947. [82]

[TRUSTEE'S EXHIBIT NO. 8]

LOUIS J. GLICKSBERG

ALBERT H. GOMMO

One Montgomery Street

San Francisco, California

In the Superior Court of the State of California in and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3172.

AFFIDAVIT FOR CLAIM AND DELIVERY

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being first duly sworn, deposes and says:

1. That he is the President of the U. S. Machinery Company, a corporation, the plaintiff above-named.

2. That plaintiff is lawfully entitled to the possession of the property claimed in this action and is described as follows, to-wit:

1 - 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

3. That said property is wrongfully detained by the defendant herein;

4. That, according to the best knowledge, information, and [83] belief of this affiant, the alleged cause of such detention of said property is as follows, to-wit: an invalid claim of right under lease contract now in default.

5. That neither said property nor any part thereof has been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff;

6. That the actual value of said property is \$2,500.00.

CLYDE W. HENRY

Subscribed and sworn to before me this 21st day of February, 1945.

Notary Public in and for the City and County of
San Francisco, State of California. [84]

No. 107344

GENERAL CASUALTY COMPANY OF AMERICA
Seattle, WashingtonPremium Charged for This Bond
Is \$50.00 Per Annum.In the Superior Court of the.....County of
Calaveras, State of California.U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, De-
fendantsUNDERTAKING ON CLAIM AND DELIVERY OF
PERSONAL PROPERTY

C. C. P., Secs. 512-513-870

Whereas, it is alleged by plaintiff herein, that defend-
ants have in their possession and unjustly detain certain
personal property, belonging to the plaintiff to the pos-
session of which plaintiff is entitled, of the value of
Twenty-Five Hundred Dollars - - - - - (\$2500.00) - - - - -
DollarsAnd Whereas, the plaintiff wants the said property de-
livered to it and by endorsement in writing upon an af-
fidavit filed herein, has ordered the Sheriff of the.....
County of Calaveras, to take the said property from de-
fendants.

Now, Therefore, the undersigned General Casualty Company of America, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, in consideration of the delivery of said property to the said plaintiff hereby acknowledges itself bound in the sum of Five Thousand and No/100 ----- (\$5,000.00) ----- Dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action, for the return of said property to the defendants if return thereof be adjudged, and for the payment to the defendants of such sum as may, from any cause, be recovered against plaintiff.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 21st day of February, A. D., 1946.

GENERAL CASUALTY COMPANY OF AMERICA

By Edith O'Rourke

Edith O'Rourke, Attorney-in-Fact.

Executed in Duplicate.

State of California

City and County of San Francisco—ss.

On this 21st day of February, 1946, personally appeared before me Edith O'Rourke, the Attorney-in-fact of the General Casualty Company of America, with whom I am personally acquainted, who being by me duly sworn,

and county

stated, that *he* resides in the city / of San Francisco, in the State of California; that *he* is attorney-in-fact of the General Casualty Company of America, the corporation described in and which executed the foregoing instrument; that *he* knows the corporate seal of the said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said Company; that *he* signed *his* name thereto as Attorney-in-fact under like authority, and that said authority has not been revoked or rescinded.

Notary Affidavit.

Marie H. Stanley

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 20, 1947.

The within undertaking and the sureties thereof are hereby approved.

Dated Feb. 21-46.

Joe W. Zwinge

Sheriff of Calaveras County, Calif. [85]

LOUIS J. GLICKSBERG

ALBERT H. GOMMO

One Montgomery Street

San Francisco, California

Attorneys for Plaintiff.

In the Superior Court of the State of California in
and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins, and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, Defend-
ants. No. 3172.

COMPLAINT IN CLAIM AND DELIVERY

Plaintiff complains of the defendants and for cause of
action alleges:

I.

That plaintiff is not aware of the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants Doe I and Doe II, and, therefore, sues said defendants by such fictitious names, and leave of Court will be asked to amend this complaint to show their true names and capacities when same have been ascertained.

II.

That at all times in this complaint mentioned, the plaintiff, U. S. Machinery Company was, and now is, a corporation legally organized and doing business under the laws of the State [86] of California.

III.

That plaintiff is informed and believes, and upon such information and belief alleges: that the defendants, Raymond I. Biggy, James F. Collins, and John W. Buol, are co-partners to do business under the firm name and style of Quartz Crystal Products Company whose main office is in the City of San Angreas, County of Calaveras, State of California.

IV.

That on or about the 10th day of November, 1944, the plaintiff was the legal owner and in possession of that certain equipment consisting of the following:

- 1 – 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

And that on or about said date, the said plaintiff, by a lease contract in writing, a copy of which is attached hereto and marked "Exhibit A", and made a part hereof as though set out in full, delivered the said equipment to the said defendants; that said contract provides for monthly payments.

V.

The said contract provides, in part, that in the event of default by lessee (being the defendants herein) in the performance of this lease, or the failure to pay any of said payments when due the said lessor (being the plaintiff herein) may at its option enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the lessee, take possession of said machinery or any part thereof, and thereupon the lessee shall have no further interest in or to said property or any portion thereof, and the amount paid

prior to the date of said re-possession shall be retained by the lessor as rental for the use of said machinery during the time that it has been in the custody of the lessee. The lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be [87] incurred by the lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

VI.

That there is now due and unpaid the sum of Eight Hundred Forty-nine and 67/100 Dollars (\$849.67) on the payments provided by said contract, there having been no installments paid subsequent to April 25, 1945, and that there remains a total unpaid balance due to the plaintiff under the terms of the said contract, including interest, the sum of Eight Hundred Forty-nine and 67/100 Dollars (\$849.67), no part of which has been paid.

VII.

That the plaintiff does hereby elect to take immediate possession of the said personal property, and elects that all payments previously made by the purchaser shall be applied as compensation for the depreciation in value and for the use of the said property.

VIII.

That prior to the commencement of this action, oral demand was made upon the defendants for the delivery of the possession of the said equipment to this plaintiff, but the defendants have failed, refused and neglected and still fail, refuse and neglect to deliver possession of the said equipment to this plaintiff, or cause the same to be

done, and the defendants, without plaintiff's consent, detain the said equipment from the possession of the plaintiff, to plaintiff's damage.

IX.

That neither the said property, nor any part thereof has been taken for a tax, assessment or a fine, pursuant to statute or seized under an execution or an attachment against the property of the plaintiff, and that the plaintiff is entitled to the immediate possession of the said equipment. That the actual cash value of the said equipment is the sum of Two Thousand, Five Hundred [88] and no/100 Dollars (\$2,500.00).

X.

That plaintiff has employed an attorney for the prosecution of this action, and the recovery of the possession of said equipment, and that his reasonable compensation for said services is, and at all times in this complaint mentioned was, the sum of Five Hundred and no/100 Dollars (\$500.00), which attorneys' fees are provided for in said contract.

XI.

That all of the defendants, claim to have some claim, right, or interest in and to the said equipment or in the said contract, but plaintiff avers that such right or claim, if any, is invalid and subordinate to that of plaintiff.

Wherefore, prays judgment against the defendants:

1. For the recovery of the possession of said equipment, or for the sum of Two Thousand Five Hundred and no/100 Dollars (\$2,500.00), the market value thereof in case recovery cannot be made.

2. For the sum of Five Hundred and no/100 Dollars (\$500.00) as and for attorneys' fees.

3. For cost of suit herein.

4. For such other and further relief as the Court may deem, meet and proper.

LOUIS J. GLICKSBERG

ALBERT H. GOMMO, JR.

Per.....

Attorneys for Plaintiff [89]

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being duly sworn on behalf of the plaintiff corporation in the above-entitled action, says:

That he is the president of said corporation; that he has read the foregoing complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

Clyde W. Henry

Subscribed and sworn to before me this 21 day of February, 1946.

(Seal)

LAURA E. HUGHES

Notary Public in and for the City and County of San Francisco, State of California. [90]

EXHIBIT "A"

U. S. MACHINERY COMPANY

Sacramento, California.

November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

1 - 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

for the term of nine months at a total rental of \$2500.00 plus \$62.50 sales-tax, of which amount \$818.75 is payable at once, and receipt whereof is hereby acknowledged by the Lessor; and the balance \$1,743.75, payable in nine monthly installments of \$193.75 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor; and shall not be deemed to be payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured against fire to the extent of \$2,500.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay [91] balance of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process of law, the Lessor may at its own option enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee,

take possession of said machinery or any part thereof, and thereupon the Lessee shall have not further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY
By CLYDE HENRY, President

Accepted:

QUARTZ CRYSTAL PRODUCTS CO.
RAYMOND I. BIGGY
JAMES F. COLLINS
JOHN W. BUOL

Date: November 10/44 [92]

In the Superior Court of the State of California in and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3171.

Action brought in the Superior Court of the State of California in and for the County of Calaveras and the complaint filed in the office of the County Clerk of said Calaveras County.

Louis J. Glicksberg

Albert H. Gommo

Attorneys for Plaintiff

The People of the State of California send Greeting to: Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants.

You are Hereby Directed to Appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the State of California in and for the County of Calaveras, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or plaintiff will apply

to the court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the State of California in and for the County of Calaveras this 21st day of February, 1946.

(Seal) JOHN SQUELLATI, Clerk.

By....., Deputy Clerk.

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 8. Filed April 8, 1946. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [93]

[TRUSTEE'S EXHIBIT NO. 9]

WESTERN UNION

* * * * *

FAB35 NL PD VIA AB=FALLON NEV DEC 31

CLYDE HENRY

1946 JAN 2 AM 9 14

285 7THST MK=

DELAYED HERE UNTIL FRIDAY. WILL BE IN
TO TAKE UP QUARTZ CRYSTAL PRODUCTS
OBLIGATION SATURDAY=

R I BIGGY

BIGGY

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 9. Filed April 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [94]

[TRUSTEE'S EXHIBIT NO. 16]

November 1, 1945.

Mr. Harry Gottesfeld,
De Young Bldg.,
San Francisco, California.

Dear Sir:—

At the request of Mr. Raymond Biggy we are pleased to submit our personal opinion of the value of the Quartz Crystal Mines equipment, located near San Andreas, California.

My estimate of the value of the plant would be \$35,000.00, and I would state further that the equipment should bring not less than eighteen or nineteen thousand dollars at a forced sale.

Sincerely yours,

Clyde Henry

Clyde Henry.

CH/s

CC: to Raymond Biggy,
903 Alta St.
Monrovia, Calif.

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 16. Filed April 19, 1946. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [95]

[Title of District Court and Cause]

SUPPLEMENT TO REFEREE'S CERTIFICATE
ON REVIEW

To the Honorable Leon R. Yankwich, Judge of the United
States District Court for the Southern District of
California, Central Division:

I, Hubert F. Laugharn, Referee in *Bankrupt* to whom
the above entitled matter has been referred, do hereby
certify as follows:

On February 28, 1947, I made and filed herein my Cer-
tificate on Review.

A request has been made by Charles A. Thomasset
that there be added to the record herein and forwarded to
the Clerk the following, to-wit: Respondent's Exhibit No.
1, filed April 19, 1946, in within proceedings, the same
being a Certificate of Business Fictitious Firm Name for
Quartz Crystal Products Co. and the same is therefore
respectfully submitted.

Dated: August 11, 1947.

HUBERT F. LAUGHARN
Referee in Bankruptcy [96]

[RESPONDENT'S EXHIBIT NO. 1]

CERTIFICATE OF BUSINESS
FICTITIOUS FIRM NAME.

The Undersigned do hereby certify that they are conducting a mining business at near the city of San Andreas, in the county of Calaveras, in the State of California, under the fictitious firm name of Quartz Crystal Products Co. and that said firm is composed of the following persons, whose names and addresses are as follows, to-wit:

Raymond I. Biggy	1304 Alameda Street	Monrovia, Calif.
John W. Buol	3625 Falcon Avenue	Long Beach, Calif.
James F. Collins	443 Orange Avenue	Long Beach, Calif.
Frank A. Briggs	918 Freeman Street	Santa Ana, Calif.
Leona W. Briggs	918 Freeman Street	Santa Ana, Calif.
Peter <u>M</u> irich	531 So. Harbor	San Pedro, Calif.
Jack Burns	1800 East Broadway	Long Beach, Calif.
Clyde J. Maylen	4421 Whitewood St.	Lakewood, Calif.
Harold L. Maylen	1601 Cedar Avenue	Long Beach, Calif.
Robert Francis Crow	333 Obispo Street	Long Beach, Calif.
T. I. Lingo	4140 Country Club Dr.	Long Beach, Calif.

Witness their hands this 26th day of May, 1944.

Raymond I. Biggy	Peter Mirich
John W. Buol	Jack Burns
James F. Collins	Harold L. Maylen
Frank A. Briggs	Clyde J. Maylen
Leona W. Briggs	Robert Francis Crow
	T. I. Lingo. [97]

State of California,
County of Los Angeles, ss.

On this 26th day of May, A. D. 1944, before me, Lee J. Myers, a Notary Public in and for said County and State, personally appeared Raymond I. Biggy, John W. Buol, James F. Collins, Frank A. Briggs, Leona W. Briggs, Peter Murich, Jack Burns, Clyde J. Maylen, Harold L. Maylen, T. I. Lingo, known to me to be the persons whose names are subscribed to the within *Instrument*, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

Lee J. Myers

Notary Public in and for said County and State.

(Endorsed) Filed Jun 22 1944 John Squellati, County Clerk.

The Foregoing Instrument is a Correct Copy of the Original on File in This Office. Attest: Apr. 17, 1946. John Squellati, County Clerk and ex-officio Clerk of the Supreme Court of the State of California, in and for the County of Calaveras. By, Deputy.

U. S. District Court. No. 44274 Y. Respondent's Exhibit No. 1. Filed April 19, 1946. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Aug. 11, 1947. [98]

[Title of District Court and Cause]

POINTS AND AUTHORITIES ON PETITION FOR
REVIEW OF U. S. MACHINERY COMPANY

To the Honorable Leon R. Yankwich, Judge of the United
States District Court for the Southern District of
California, Central Division:

The Referee has held herein that the two agreements of lease, in writing, dated November 10, 1944, wherein this petitioner is the lessor and bankrupt above named is the lessee, are invalid as against the creditors of the lessee.

The Referee has held that the agreements were executed not later than November 14, 1944, and not recorded until December 18, 1944, therefore invalid under Section 2980 of the Civil Code of the State of California, which requires such recordation within 20 days after execution.

Petitioner contends that such holding is erroneous and that [99] both of the agreements were executed December 14, 1944. It is admitted that these agreements were recorded on December 18, 1944. This petitioner contends that there is no evidence, either direct or inferential, of sufficient substance to support the Referee's decision that the agreements were "executed" on November 14, 1944.

I.

THE EVIDENCE:

Clyde Henry, President of petitioner, U. S. Machinery Company, who, on behalf of petitioner, executed said agreements, testified on April 8, 1946, as follows:

Q. Mr. Henry, I will now show you Trustee's Exhibit 1, which is the contract or lease agreement on the Caterpil-

lar tractor and I ask you when that was signed by you on behalf of the U. S. Machinery Company?

A. That was signed on December the 12th, 1944.

Q. And I will now show you Trustee's Exhibit 2, which is the trommel and so forth lease agreement, and ask you when that was signed on the part of the U. S. Machinery Company?

A. On the 12th day of December, 1944, I signed it.

Q. And prior to the 12th day of December, 1944, neither of the instruments or agreements had been executed by the U. S. Machinery Company, had they?

A. That is correct.

Later at the same session, the Referee himself elicited the following testimony:

Q. What was the reason for the delay in the execution of the contracts on your behalf?

A. Which contracts?

Q. Exhibits 1 and 2, the original ones.

A. They were mailed to Mr. Biggy and they got back to our office on or about December the 10th and I signed it on December the 12th and we mailed it to San Andreas to be [100] recorded.

Q. They bear date of November the 10th, 1944, and a notarial acknowledgement on November 14, 1944, and then the notarial acknowledgment of your secretary December 12, 1944. You are of the opinion that the signed contracts by the buyers were not received back in your office until about December the 10th?

A. That is right.

Q. And you thereupon signed them and recorded them on December the 18th, 1944. Did a letter accompany them?

A. That I could not say because they telephone me in San Francisco that the contracts had been received and I went to Sacramento and signed them.

Under cross-examination by the Trustee's counsel the following testimony was adduced from the same witness:

Q. By Mr. Goggin: Now, you say you received contracts back about December 10th?

A. That is correct.

Q. How do you fix that date?

A. Because I had brought pressure on the Sacramento office to have this contract drawn right and have it recorded, because it had come to my attention that this outfit was not too reliable.

Q. Did you contact them from Sacramento?

A. Yes.

Q. Who did you talk to?

A. Mr. Stockley and the bookkeeper.

Q. When was that, about December the 10th?

A. I would say it was before that.

Q. How much before?

A. I had talked to them every day for 15 days previous to December the 10th, that is in general conversation. I [101] always made it a point to mention that this contract had not been received in time to have it recorded.

At the hearing held April 9th, the Referee made the following remarks:

The Referee: Now, there are one or two matters raised that I am not clear on—I am not clear on this

contract and its execution; from Mr. Biggy I gathered that the contract was signed down here on the date indicated before a notary, and I thought from what he implied that, right after it was signed, on November 10, 1944, he mailed it back to the Sacramento office. Now, on the other hand, it is quite clear from Mr. Henry's testimony that he was checking with his Sacramento office continuously and it didn't get there until December the 10th; was not received. That is one situation I would like to have cleared up, if there is anything on it.

As a result of said remarks another hearing was held on August 2nd, at which time Mr. Henry testified in part as follows:

Q. By Mr. Thomasset: Mr. Henry, I call your attention to what purports to be a lease contract which bears the date of November 10, 1944, and which has been admitted into evidence heretofore as Trustee's Exhibit 1, and which bears a recordation stamp dated December 18, 1944; that recordation stamp being or purporting to be that of the recorder of Calaveras County. Now, you have already testified in this matter and I want to call your attention to the notarial acknowledgment that is attached to that Exhibit 1, and ask you if you recall the occasion when that exhibit was acknowledged before the notary?

A. I recall the date when it was acknowledged.

Q. The notary appears to be N. W. Hicks, is that correct? A. That's right. [102]

Q. And it is Mr. or Mrs. or Miss. A. Mr.

Q. Does Mr. Hicks have a place of business anywhere?

A. Yes, sir, he has a place of business right across from 921 Del Paso Boulevard, North Sacramento.

Q. Did you, on the day that the notarial acknowledgment bears date, to-wit: the 12th day of December, 1944, appear before Mr. Hicks? A. Yes, sir.

Q. And did you have with you the lease contract which is marked Trustee's Exhibit 1?

A. Yes, sir.

Q. Now, when you appeared before Mr. Hicks, the notary, did the signature, Clyde Henry, president, under U. S. Machinery Company, on this lease contract, marked Exhibit 1, have at the time you appeared before the notary—had that signature been affixed to that instrument?

A. No, sir. I signed it in the presence of Mr. Hicks.

Q. So that this signature, Clyde Henry, appearing under the U. S. Machinery Company, and also in pen and ink below, the signature, Clyde Henry, president, was affixed by whom? A. By myself.

Q. And that is your signature? A. Yes.

Q. And you are the president of the U. S. Machinery Company? A. Right.

Q. On what date did you affix that signature?

A. On the 12th day of December, 1944.

Q. And you were acting in what capacity on that occasion?

A. As president of the U. S. Machinery Company.

Q. And for and on behalf of the U. S. Machinery Company? [103] A. Yes, sir.

Q. Now, did you on that occasion have any other instrument? A. Yes, sir.

Q. What?

A. I had this particular contract you are now looking at.

Q. Now, we are looking at the instrument which has been marked Trustee's Exhibit 2?

A. Yes, sir.

Q. And which bears on the reverse side of it a recodation of the recorder of Calavares County as of the 18th day of December, 1944, is that right?

A. Yes, sir.

Q. I will ask you to look at the signature, Clyde Henry, and then the word president underneath that, which has been written under the U. S. Machinery Company, at the bottom on Trustee's Exhibit 2, whose signature is that? A. Mine.

Q. Did you affix that yourself? A. Yes, sir.

Q. On what date did you affix that signature on Trustee's Exhibit 2?

A. On December the 12th, 1944.

Q. And in what capacity were you affixing that signature?

A. As president of the U. S. Machinery Company.

Q. And for *an* on behalf of the U. S. Machinery Company? A. Yes, sir.

Q. Now, on that occasion, do you remember whether it was in the morning or the afternoon, or what?

A. To the best of my recollection it was in the afternoon; I would say about 2:30.

Q. Were you accompanied by anyone else?

A. Yes, sir. [104]

Q. By whom?

A. Mr. Harry Satterfield.

Q. At the time that you appeared before Mr. Hicks, the notary, on the 12th day of December, 1944, with the instrument which has been marked Trustee's Exhibit 2,

had the signature of Clyde Henry, president, been affixed at that time?

A. No, sir, not previous to that.

Q. And it was, as you have testified, signed by you in the presence of the notary? A. Yes.

Q. And on that date? A. Yes, sir.

Q. Do you recall what you did, after these two exhibits, 1 and 2, were notarized by the notary? Were they returned to you?

A. Yes, sir, they were handed right back to me by the notary.

Q. And did you do anything in connection with those exhibits or copies of the exhibits, to the best of your recollection?

A. The copies of the exhibits I mailed to the Quartz Crystal Company, and the original I mailed to the recorder in San Andreas.

At the same hearing Harry Satterfield, produced by this petitioner, testified as follows:

HARRY SATTERFIELD

having been first duly sworn on oath, testified as follows:

By Mr. Thomasset:

Q. Your name is what?

A. Harry Satterfield.

Q. What is your address?

A. My business address? [105]

Q. Yes.

A. It has been 503 Van Ness Avenue, San Francisco, but that property has been sold and we have changed our address, but that is what it was at that time.

Q. Do you know Mr. Clyde Henry, who preceded you on the stand? A. I do.

Q. Do you recall being with him in Sacramento on an occasion in 1944? A. I do.

Q. I want you to look at these two instruments, one of them has been marked Trustee's Exhibit 1, and the other has been marked Trustee's Exhibit 2, each one has affixed to it a notarial acknowledgment, bearing the signature of N. W. Hicks, do you recall being in Sacramento with Mr. Henry at any time when you saw those exhibits?

A. I was in Sacramento at that time.

Q. You were? A. Yes, sir.

Q. And do you recall being at Mr. Hicks' place of business? A. Yes, sir.

Q. What kind of a business did he have?

A. A gasoline business.

Q. What does he have, an office there?

A. He has an office off to the side there.

Q. Do you recall the date, independently of these contracts?

A. Well whatever date that paper was—

Q. Do you remember seeing those instruments, by instruments I mean these two papers which have been marked Trustee's Exhibit 1, and Trustee's Exhibit 2. Now, let's take a look at Trustee's Exhibit 1, and I call your attention to the signature, Clyde Henry, president, underneath U. S. Machinery Company, did you see Mr. Henry affix that signa- [106] ture?

A. Well, I saw him take those papers in there while we were getting gasoline. They both of them signed, this gentleman, the notary, and Mr. Henry; I didn't know he was a notary at the time though.

Q. What about Trustee's Exhibit 2, calling your attention to the signature, Clyde Henry, president, under U. S. Machinery Company; were you present at the time Mr. Henry affixed that signature?

A. Yes, sir.

Q. Was that at the same time that the notary signed that acknowledgment?

A. They both signed.

Q. They both signed at the time?

A. Yes, sir.

Q. You were not exactly in the office were you when Mr. Henry signed?

A. No, I was sitting in the car.

Q. You were in the car; about how far away?

A. About 15 feet; the gasoline pumps and the car and then the office.

Q. When you say you saw Mr. Henry sign both of these instruments, what do you mean; what, if anything, attracted your attention?

A. As he got out of the car he had the papers; they looked like they were legal papers; I saw him take them out of his pocket and walk over to the office; I was in a hurry to get to San Francisco and they spent a lot of time in the office and I said, "What was all the time for?" And he said, "I have to get these signatures on this lease." At that time I was going to buy machinery, a shovel.

Q. You are in that kind of business? [107]

A. Yes, sir. I was trying to get a shovel, a tractor, and a bulldozer, and also a rooter.

Q. When he came back did you take a look at the contracts?

A. I said, "What did you take all of the time about?" and he said, "Here is the title on some of the machinery you wanted, but it is sold."

Q. Now, where these signatures apparently freshly written at the time you looked at them?

A. Yes, sir.

Q. Do you know what I mean?

A. Yes, they were fresh. They just was writing them.

Mr. Thomasset: That is all.

Q. By the Referee: You were in the car and he went into the office, a little room where the notary was, some 15 feet or so away? A. That is right.

Q. And then apparently he signed these papers and had the notary affix the seal? A. Yes, sir.

Q. And came back out? A. That's right.

Q. Well, you don't know anything about what the document showed or contained, do you? He didn't take the papers out of his pocket when he came back, did he?

A. No; when he came back, he said, "Here is some of the stuff you were trying to buy."

Q. But he had already sold it?

A. Yes, sir.

Q. Counsel's question seemed to imply that you saw these instruments and very carefully scrutinized them.

A. Well, I did take a look at some of the prices.

Q. The Referee: He showed you his contracts when he came back? [108] A. Yes, sir.

Q. And his signatures were already on them?

A. Yes, sir.

The Referee: I see. Any other questions?

Mr. Thomasset: No other questions.

Mr. Chichester: No other questions. The witness is excused.

(Thereafter other matters in this same case were taken up after which court was adjourned.)

Mr. Biggy, for the bankrupt, testified, in substance, that the bankrupt "executed" both of said agreements on November 14, 1944, and mailed them to the Sacramento office of this petitioner on that day.

With the foregoing before him the Referee held that the contracts were "executed" after the bankrupt had signed them and before the lessor had affixed its signature to the instruments.

It is the contention of this petitioner that such a holding is contrary to law and is based upon conclusions and inferences which the evidence does not warrant, and that therefore the order of the Referee, predicated upon the invalidity of the agreement, is erroneous and should be set aside.

II.

THE LAW:

Section 2980, Civil Code of the State of California, uses these words:

"Every conditional sales contract, lease, and bailment or feeder agreement covering live stock and other animate chattels and every conditional sales contract of equipment and machinery used or to be used for mining purposes, must be acknowledged, or proved and certified, and must be recorded within twenty (20) days after its execution . . ."

If this section applies, the word "execution" refers to the contract, and, it is submitted, does not mean the unilateral act [109] of the party who signs it constitutes "execution" of the contract.

On page 2 of the Referee's Certificate on Review, the Referee states (line 29):

"I found that the contracts were executed by the buyers on November 14, 1944, and were mailed to the office of the seller on that day." That is a reference to the unilateral act of one of the parties, the lessees. Incidentally the use of the word "buyer" is not supported by the evidence.

The word "execution" necessarily includes performance of three acts: signing, sealing, and delivery.

Williams v. Kidd, 170 Cal. 631, 650, 151 Pac. 1.

A contract, purporting to be made between several parties, containing mutual covenants of which those of one party are the consideration of the others, must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute.

Emeric vs. Alvarado, 64 Cal. 529, 574, 577, 578, 579, 580, 2 Pac. 529.

According to the testimony of Mr. Henry, president of petitioner, after he signed both instruments on December 14, 1944, he then made a delivery by mailing a copy of each to the bankrupt.

The Referee, by his holding, has held, in effect, that after the bankrupt had signed the agreements, that the bankrupt could have enforced them against the lessor, petitioner herein, even though the latter had not signed

them. The Referee has produced no law to substantiate such a proposition.

We respectfully submit that the word "execution" as used in Section 2980 of the Civil Code, means signing by all parties and delivery after signing by all of the parties. There is absolutely no evidence here to indicate that any delivery was made of the lease agreements prior to the signing of said lease agreements by this petitioner, the lessor, on December 14, 1944. [110]

III.

REFEREE'S HOLDING OF INVALIDITY IS PREJUDICIAL:

If the contracts are not invalid under the provisions of Section 2980 of the Civil Code, then the whole of the Referee's decision, based upon invalidity, must fall and the rights of the lessor, based upon a valid agreement, rights of the lessor, have been infringed upon by the Referee's holding.

The lease agreements are dated November 10, 1944. Each provides that the lease shall not be construed as a sale and title to the property shall remain in lessor until all of the payments provided for are made and all of the conditions and terms fully complied with by the lessee, but, if all conditions and terms are complied with then after all payments are made by the lessee, at the election of the lessee, the lessor will deliver a bill of sale to the property upon the receipt of \$1.00. There are provisions also for the retaking of the property in the event of default, attachment, etc.

The lessee made rental payments to April 25, 1945. From that date on not a single rental payment has been

made despite provisions for monthly payments. In January, 1946, lessor elected to take possession of its property, to which it had title, and sold a portion of it to one P. De Michelis subject to delivery. There being difficulty in obtaining delivery petitioner instituted two actions of claim and delivery in the Superior Court for the County of Calaveras and proceeded to take possession of the property. While in the course of taking possession of the property and after taking possession of a part of it, the bankrupt, to forestall petitioner and defeat its rights, filed bankruptcy.

If the agreements are valid then entirely different results should flow from them than those which have been decreed by the Referee.

The law seems clear. [111]

Upon buyer's default, seller may retake possession of the property.

Smith v. Miller, 5 Cal. App. 2nd, 564, 43 Pac. 2nd 347.

Reservation of title in seller is valid against levying creditors of buyer.

Mohr vs. First National Bank of Hanford, 69 Cal. App. 756, 232 Pac. 748.

If the written agreement expressly declares that title shall remain in the seller, there would seem to be no basis for a contention that the sale was absolute and not conditional.

22 Cal. Juris. 1117, note 11, citing many cases.

Bice vs. Arnold, 75 Cal. App. 629, 243 Pac. 468.

Trustee in Bankruptcy does acquire title to goods in possession of bankrupt under conditional sales contracts but not paid for.

Bailly vs. Looch, 103 Cal. App. 220, 284 Pac. 236.

The retaking of possession prior to bankruptcy regains whatever interest the conditional vendor had in the property.

Jennings vs. Swartz, 86 Washington 202, 149 Pac. 947.

Title to goods delivered to bankrupt under an oral contract of conditional sale has been held not to pass on delivery though formal contract were not executed until after delivery.

Freedman vs. White, 22 Fed. 2nd 745.

The leases also provide:

“All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein,” [112]

There is no evidence to support the findings of fact of any sale involving the property described in the leases. We submit that the findings of fact numbered 2 is totally unsupported by the evidence. The bankrupt certainly never contended at any time that it possessed the property involved under any other arrangement than that set forth in the leases. It took bankruptcy and the fertile mind of someone else than the bankrupt to advance any other theory. The latter, it is submitted, is unsupported either by the law or by the evidence.

If the contracts are valid then the order to the effect that U. S. Machinery Company, petitioner, has *nor* right, title, interest, lien or claim upon any of the personal property still in the possession of the Trustee is erroneous. On the contrary title would still remain in the lessor and the latter would be entitled to all of the relief prayed for in its petition for reclamation on file herein.

Respectfully submitted this 5th day of March, 1947.

CHARLES A. THOMASSET

Attorney for U. S. Machinery Company [113]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 5, 1947. [114]

[Title of District Court and Cause]

OPINION

Appearances:

Charles A. Thomasset, Esq., Attorney for U. S. Machinery Co., Los Angeles, California.

George T. Goggin, Esq., Attorney for Trustee, Los Angeles, California. [115]

Yankwich, District Judge:

On January 28, 1947, the Referee made an Order in the above matter upon the petition in reclamation of the U. S. Machinery Company in which the petitioner sought possession of certain machinery and equipment in the possession of the Trustee. The Order determined that the personal property was an asset of the bankrupt estate, that the petitioner was not entitled to its possession, and that it owed to the Trustee the amount of \$1331.85. The basis for the Order was that two agreements in writing entered into by the U. S. Machinery Company and the bankrupt dated November 10, 1944, and not recorded until December 18, 1944, were invalid under Section 2980 of the Civil Code of the State of California. This is a petition to review the Order.

The Referee in his certificate on review admits that the petitioner has correctly set forth his ground for review in this language:

“That petitioner alleges that each of said agreements was executed on December 12, 1944, and recorded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is er-

roneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner.”

A study of the memorandum opinion which the Referee filed convinces me he arrived at the wrong conclusion, because he misinterpreted the meaning of the phrase “its execution” in Section [116] 2980 of the Civil Code of California, the material portion of which reads:

“Every conditional sales contract, lease, and bailment or feeder agreement covering live stock and other animate chattels and every conditional sales contract of equipment and machinery used or to be used for mining purposes, must be acknowledged, or proved and certified, and must be recorded within twenty (20) days after its execution in the office of the recorder of the county where the buyer, the party feeding, the lessee or the bailee, respectively, resides at the time he executes such contract, lease, feeder or bailment agreement, or in case the buyer, the party feeding, the lessee or the bailee is a non-resident of this State, in the office of the recorder of the county or counties where the property involved is located at the time the contract, lease, feeder or bailment agreement is executed by the buyer, lessee, or bailee or feeder, and a contract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated otherwise, it shall be void as to the lien or interest of the seller, the lessor, bailor or owner against bona fide purchasers, encumbrancers and those having no actual knowledge of the contract, lease,

feeder or bailment agreement who become creditors of the buyer, the party feeding, the lessee or the bailee, while said property is in the possession of any of the last mentioned parties.” (Emphasis added.) [117]

The Referee is not so much to blame because other California statutes, to be referred to, and bearing on the subject, and many of the cases to be cited herein were not called to his attention.

And here I must call attention to a fault which is apparent in many of these reviews, i. e., that counsel, who specialize in bankruptcy, especially those who appear for Trustees, seem to rely too much on general “equitable bankruptcy principles” contained in Collier and Remington, and pay too little attention to the fact that contractual rights in bankruptcy are determined by the laws of California and the decisions interpreting them. Some time ago, I had before me a review in which the Referee had determined that the Trustee had certain rights to an automobile because the bankrupt, being indebted to a bank on several obligations, made certain payments which were not applied to the automobile indebtedness. To my surprise, I discovered that, at no time, had the Referee’s attention been called to a section of the Civil Code of California (Section 1479) which permitted the bank to so apply the money.

In another matter, the point upon which the review turned was the effect and manner of service of process on a dissolved corporation. That, too, depended on California statutes to which the Referee’s attention was not called by either side. (California Code of Civil Procedure, 411(6)(a), Civil Code, Sec. 402(a).) [118]

In the case before us, the Referee was induced to disregard binding California law entirely. His memorandum opinion fully demonstrates this. For, while indicating why he disbelieved uncontradicted testimony as to the date of the execution of the instrument,—including (I assume) the stipulated testimony that the notary who took the signature of the officer of the U. S. Machinery Company would testify that the instrument was signed and acknowledged before him on December 12, 1944,—he proceeds to determine that the lease-contract violates Section 2980 of the Civil Code of California without referring to any cases interpreting the section or defining execution and ignoring, as will appear later, even those which were cited to him in the briefs. He bases his decision on his inferences from facts. As to the law, he contents himself with a reference to the rather nebulous “equity powers of the bankruptcy court” (Memorandum Opinion, page 6, line 24). Cases depending on statutory interpretation cannot be determined by general references to bankruptcy powers.

And now to the problem before us.

I advert to the fact that this is another of those cases in which the “security” was not one given to an outsider, but was given for a part of the purchase price. Consequently, the approach to the problem is that laid down by myself in *re Mercury Engineering Company, Inc.*, 1946, D. C. Cal., 68 Fed. Sup. 376, which was recently sanctioned by the Circuit Court of Appeals for the Ninth Circuit in *Citizens National Trust & Savings Bank v. Gardiner*, decided on April 28, 1947, and not yet officially reported.

It may well be that the object of this section, as I [119] stated some years ago, in *re* Great Western Petroleum Corp., 1936, D. C. Cal., 17 Fed. Sup. 247, 250, is to protect creditors against claims to property in possession of a bankrupt on the basis of which the creditors may have extended credit. But the fact here is, as in the Mercury Engineering Company case, *supra*, that the persons who claimed rights under the lease or conditional sales contract were the very persons who furnished the machinery which was not paid for. And so we come to the main question.

The Referee took the view that, because one party to this lease contract or the conditional sales contract,—the bankrupt—had signed and executed the instrument, this was “an execution” of the instrument within the meaning of the section. This interpretation disregards entirely the law of California. We do not need to speculate as to what “execution” means because Section 1933 of the Code of Civil Procedure, which has been in effect since 1872, tells us:

“The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.”
(California Code of Civil Procedure, Sec. 1933.)

The Courts of California and the Circuit Court of Appeals for the Ninth Circuit have held that this section means exactly what it says, i. e., it means subscribing not by one party, but by all the parties who are required to sign it and delivering it to the party for whose benefit it is made, or delivering it for record so as to make it notice to the world. In the case of a lease contract or contract of sale of personal property, delivery means de-

livery of the instrument, the lease contract, [120] to the lessee after it has been signed by both the lessor and lessee, whether it is to be recorded or not. And when an instrument which, on its face, shows that it was intended to be signed by several parties, is signed by one only of the parties to be bound, and is in the possession of others who are also supposed to sign it, there is no "execution" within the meaning of California law until all the parties have executed it and delivered it to the others or recorded it. (See, *McCarthy Co. v. Commissioner of Internal Revenue*, 1935, 9 Cir., 80 F. (2d) 618 and California cases cited at page 620.) This is also the general rule. (See, 33 C. J. S., Executions, page 120.)

In 17 C. J. S., Contracts, Section 62(a), pages 411-412, it is said:

"It is held in numerous cases that, where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it. The cases so holding are usually those in which the parties executing the instrument would have a remedy by way of indemnity or contribution against the other parties named, which remedy is lost by the failure of such other parties to execute the instrument. The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition

that it is to be executed by the others, and, there-
[121] fore, that until executed by all, it is inchoate
and incomplete and never takes effect as a valid con-
tract, and this is especially true where the agree-
ment expressly provides, or its manifest intent is,
that it is not binding until signed.” (Emphasis added.)

In *Coen v. American Surety Company of N. Y.*, 1941, 8 Cir., 120 F. (2) 393, 397, it is said:

“Under these authorities the execution of a written contract includes three acts; (1) Signing and (2) unconditional delivery by the promisor and (3) acceptance by the promisee.”

In *Barber v. Burrows*, 1876, 51 C. 405, 407, one of the earliest California cases on the subject, it appeared that the instrument called for execution by four persons. Only three executed it. The Court, in a very brief opinion, laid down what has since been the law of California, by saying:

“The instrument of September 2, 1872, was never completely executed. It is evident upon an inspection of the writing itself that it was intended to be signed by all the parties to the contract upon which it was indorsed. These parties were the two principals in the contract and the two sureties upon the bond attached to and forming a part of the contract. It was signed by but three of these persons.” (Emphasis added.)

This principle was declared later in *Emeric v. Alvarado*, 1884, 64 C. 529, in a very elaborate discussion which continues for several pages (see pages 578 et seq.)—a

case which the Referee had before him. This case specifically lays down the rule that where an instrument shows on its face that it cannot become [122] effective unless signed by all parties, it is not executed until it is so signed and delivered. This doctrine finds sanction also in *Williams v. Kidd*, 1915, 170 C. 631, 650, where the Court says:

“Further, it is to be noted that ‘execution’ is a word of well-defined legal meaning, and is here employed with that meaning. ‘Execution’ includes effective delivery.”

In *Sparks v. Mauk*, 1915, 170 C. 122, 123, it is said:

“It is the undoubted rule that where the contract contemplates the execution of it by signing either party has the right to insist upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract. *Tewsbury v. O’Connell*, 21 Cal. 60; *Spinney v. Downing*, 108 Cal. 666 (41 Pac. 797).”

(See also, *Jackson & Thomas v. Torrence*, 1890, 83 C. 523, 538-539; *Hartwell v. Ganahl Lumber Co.*, 1908, 8 C. A. 733; *Winter v. Kitto*, 1929, 100 C. A. 302; *Anthony Macaroni Co. v. Nunziato*, 1935, 5 C. A. (2d) 588.) The latest case on the subject is *Wilk v. Vencill*, 1946, 76 A. C. A., 806, 808, where very pithily Mr. Justice Doran says:

“The property described was owned in joint tenancy; the contract was signed by only one of the

owners, hence the execution of the instrument was incomplete. (Barber v. Burrows, 51 Cal. 404.) (Emphasis added.)

Of course, when a contract is executed by a party to be charged, there may be circumstances under which, as between [123] him and the party who did not sign, he may be held to it, especially when the other side has performed. But here we are not dealing with such a situation. We are dealing with a requirement which makes an instrument invalid unless it has been recorded within a certain time after "execution". So that in determining what "execution" means, we must look to the contract to see if it is unilateral or bilateral. A glance at the lease contract shows it to be the type of contract which would have conferred no rights on the bankrupt unless signed by the company which owned the machinery. The first sentence of the contract reads:

"The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:"

The contract contains the usual conditions, reserves title, recites that "the full agreement between parties is contained herein," and provides for signature by an agent

of the "U. S. Machinery Co." and for acceptance by the lessee in this form:

"Accepted: Quartz Crystal Products Co.

Raymond I. Biggy

John W. Buol

James F. Collins"

It is not disputed that Biggy, Buol and Collins, composing the Quartz Crystal Products Co., signed and acknowledged the instrument before a Notary on November 14, 1944. But they acquired no rights under it until it was also executed by the U. S. Machinery Company, the owner of the property. The record is [124] undisputed that it was signed by them and acknowledged before a Notary on December 12, 1944, and thereafter sent for recordation in the County where the machinery was located and actually recorded, at the request of the U. S. Machinery Company, on December 18, 1944. The Findings of the Referee to the contrary find no support in the record or in the law. The Referee seems to think that it should have taken only two or three days for the U. S. Machinery Company to have one of its officers execute the instrument and record it. He would, therefore, penalize them and deprive them of the benefit of the Section because of delay. I find nothing in the law of California or in Federal law which would warrant us penalizing the owner of property for delay in executing such an instrument. We are not dealing with a section of the type I had under consideration in re Mercury En-

gineering Co., supra, where I had to determine what is or what is not a "reasonable time." The Code Section under consideration has saved us the trouble. It has fixed the time,—twenty days "after execution." As "execution" means signing by both parties and delivery, without which the instrument was not effective, we cannot penalize the party whose property it was by insisting that when one party signed it, they should have signed it within two or three days. For that is not what the law says. The law says simply that it "must" be recorded within twenty days after "execution." The record shows that it was not fully executed until December 12, 1944, when the owner of the property, without whose signature the contract conferred no rights, executed the instrument. It was recorded six days after such execution. The [125] fact that, in the meantime, the bankrupt may have had possession of the property under this unexecuted contract does not alter the rights of the lessor.

It follows that the Referee interpreted the law incorrectly and that his order dated January 28, 1947, must be and is, hereby, reversed.

Dated this 6th day of June, 1947.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Jun. 6, 1947. [126]

In the District Court of the United States
Southern District of California
Central Division

Honorable Leon R. Yankwich, Judge
No. 44274-Y Bkcy.

In the Matter of QUARTZ CRYSTAL PRODUCTS
COMPANY, a corporation,

Bankrupt.

ORDER ON PETITION FOR REVIEW

The Petition for Review of the Order of the Referee, dated January 28, 1947, upon the petition of reclamation of the U. S. Machinery Company, heretofore argued and submitted, is now decided as follows:

On the basis of the Opinion herewith filed, the said Order of the Referee, dated January 28, 1947, is reversed.

Dated this 6th day of June, 1947.

LEON R. YANKWICH
Judge

Counsel notified.

Judgment entered Jun. 6, 1947. Docketed Jun. 6, 1947.
Book 10, page 521. Edmund L. Smith, Clerk; by Louis
J. Somers, Deputy.

[Endorsed]: Filed Jun. 6, 1947. [127]

[Title of District Court and Cause]

NOTICE OF APPEAL

To U. S. Machinery Company and Its Attorney Charles
A. Thomasset:

Notice Is Hereby Given that William I. Heffron, the Trustee for the Quartz Crystal Products Co., a limited copartnership composed of Raymond I. Biggy, John W. Buol and James F. Collins, Bankrupt, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above-entitled bankruptcy matter on the 6th day of June, 1947, by the Honorable Leon R. Yankwich and from the whole thereof reversing the order of the Referee dated January 28, 1947.

Dated: This 2d day of July, 1947.

GEORGE T. GOGGIN

Attorney for Appellant

[Endorsed]: Filed Jul. 3, 1947. Mailed copy to Charles A. Thomasset. [128]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY UPON APPEAL

The appellant herein respectfully intends to rely upon the following points upon his appeal:

I.

That the conditional sales contracts between the bankrupt and the U. S. Machinery Company are invalid and void as to the Trustee and as to the creditors of the bankrupt under and by virtue of the provisions of Section 2980 of the Civil Code of the State of California, in that the said contracts were not recorded within the time prescribed in said Section.

II.

That the amount due the U. S. Machinery Company by the bankrupt under said contracts was the sum of \$2,368.15, and the receipt of \$3,700.00 by the said U. S. Machinery Company from the sale of the equipment under said contracts left a surplus due and owing to the Trustee and the estate herein in the amount of \$1,331.85.

Respectfully submitted,

GEORGE T. GOGGIN

Attorney for Appellant

[Endorsed]: Filed Jul. 14, 1947. [129]

[Title of District Court and Cause]

STIPULATION

It is stipulated that the original reporter's transcript of excerpts taken from proceedings in the above entitled matter may be submitted and transmitted in its original form to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

It is further stipulated that the petition to reclaim property by U. S. Machinery Company may be in the form designated by the appellant and that portion that is being eliminated may have inserted the following:

Here is set forth the contract being Trustee's Exhibit No. 1 or No. 2, as the case may be.

Dated this 7th day of August, 1947.

GEORGE T. GOGGIN

Attorney for Appellant

CHARLES A. THOMASSET

Attorney for Appellee [135]

ORDER

Good cause appearing, it is hereby ordered that the above stipulation be and the same is hereby approved and it is accordingly so ordered.

Dated this 11th day of August, 1947.

LEON R. YANKWICH

Judge of the United States District Court

[Endorsed]: Filed Aug. 11, 1947. [136]

[Title of District Court and Cause]

STIPULATION

It is stipulated that the record of appeal herein shall contain the certificate of business fictitious firm name of the bankrupt herein which was filed April 6, 1946, and that the Clerk shall include said certificate in the record of appeal.

Dated: August 4, 1947.

GEORGE T. GOGGIN

Attorney for Appellant Quartz Crystal Products Co.

CHARLES A. THOMASSET

Attorney for Appellee U. S. Machinery Company

ORDER

Good cause appearing it is hereby ordered that the record of appeal herein shall contain the certificate of business fictitious firm name of the bankrupt herein which was filed April 6, 1946 and the Referee is hereby ordered to certify said certificate to the District Court.

Dated: August 11, 1947.

LEON R. YANKWICH

[Endorsed]: Filed Aug. 11, 1947. [137]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 136 contain full, true and correct copies of Debtor's Petition; Orders of Adjudication and of General Reference; Referee's Certificate on Review; Petition for Order to Show Cause and Restraining Order; Order to Show Cause and Restraining Order; Petition to Reclaim Property (Partial); Order to Show Cause; Amended Petition for Order to Show Cause; Memorandum of Opinion and Direction for Further Hearing; Order to Take Testimony of Pete De Michelis and Joe W. Zwinge; Answer to Interrogatories Propounded to Peter De Michelis on Behalf of U. S. Machinery Company; Memorandum Opinion; Findings of Fact, Conclusions of Law and Order re U. S. Machinery Company, et al.; Trustee's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, and 16; Supplement to Referee's Certificate on Review; Respondent's Exhibit No. 1; Points and Authorities on Petition for Review of U. S. Machinery Company; Opinion; Order on Petition for Review; Notice of Appeal; Statement of Points Upon Which Appellant Will Rely on Appeal; Designation of Record on Appeal by Trustee; Appellee's Designation of Record on Appeal and two Stipulations and Orders re Record on Appeal which, together with Reporter's Transcript of Excerpts taken from Proceedings held on

April 19, 1946 and August 2, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$34.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 11th day of August, A. D. 1947.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke

Chief Deputy Clerk.

[Title of District Court and Cause]

Before Honorable Hubert F. Laugharn, Referee in
Bankruptcy

REPORTER'S TRANSCRIPT OF EXCERPTS
TAKEN FROM PROCEEDINGS HELD IN
THE ABOVE-ENTITLED CASE ON APRIL
19, 1946 AND AUGUST 2, 1946, BEING THE
TESTIMONY OF CLYDE HENRY AND
HARRY SATTERFIELD

Appearances:

Chas. A. Thomasset, Esq., 610 South Broadway, VA
9135, Los Angeles, California, Attorney for the U. S.
Machinery Company.

Geo. T. Goggin, Esq., 354 So. Spring Street, MU 2248,
Los Angeles, California, Attorney for the Trustee.

Quartz Crystal Products Company.

April 8, 1946, 2:00 p. m.

First Meeting; Order to Show Cause on Various
Parties.

(Excerpts from the Hearing.)

CLYDE W. HENRY,

having been first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Thomasset:

Q. Mr. Henry, you are the president of the U. S.
Machinery Company? A. Yes, sir.

Q. And the U. S. Machinery Company is the party
who executed the lease agreements here which have been
marked Trustee's Exhibits 1 and 2, do you know what I
have reference to? A. Yes, sir.

(Testimony of Clyde W. Henry)

Q. Those are two lease agreements dated November 10, 1944. Now suppose you take either one of them, may I have Trustee's Exhibit 1?

The Referee: Here they are.

Mr. Thomasset: May I step around there, please?

The Referee: Yes. This is one of them and here is the other.

Q. By Mr. Thomasset: I will show you Trustee's Exhibit 1, which is an agreement with reference to the sale of the 60 Caterpillar tractor, with a 10 foot dozer blade. [2*] How much has been paid under that particular agreement?

A. I can tell you the balance due on that rather than the balance that has been paid.

Mr. Thomasset: All right.

The Witness: Due as of February 10, 1946, \$849.67.

Q. That is on what contract?

A. The Caterpillar.

Q. As of February what?

A. February 10, 1946.

Q. Now, with reference to the agreement marked Trustee's Exhibit 2, which is the one that includes the trommel.

A. The balance due as of February 10, 1946, \$1,-622.48.

Q. Now, on Trustee's Exhibit 1, the last payment was made when? A. April 25, 1945.

Q. Now, with reference to the agreement of lease, marked Trustee's Exhibit 2, when was the last payment made? A. April 25, 1945.

(Testimony of Clyde W. Henry)

Q. How many payments were made on the agreement marked Trustee's Exhibit 2, that is the trommel.

A. Five payments.

Q. Were those five monthly payments?

A. Yes, sir.

Q. And on agreement marked Trustee's Exhibit 1, how many payments were made? [3] A. Five.

Q. Now, with reference to the agreement marked Trustee's Exhibit 1; I will change that, Trustee's Exhibit 2, you say there are five payments?

A. Yes, sir.

Q. Two of those payments were incomplete, were they not? A. Yes, sir.

Q. One was \$202.50 and the other was \$46.88, were they not? A. Yes, sir.

Q. So four complete monthly payments only were made on that agreement, is that right?

A. Just three complete monthly payments were made.

Q. I know, but if you add up those two partial payments they will equal one full payment, will they not?

A. No, sir, yes, they do. I beg your pardon.

Q. You have four complete monthly payments?

A. That's correct.

Mr. Thomasset: That is all.

By Mr. Goggin:

Q. Mr. Henry, Have you had any correspondence with the bankrupt company with respect to giving them credit in addition to the money that they actually paid, so far as their contracts were concerned? A. Yes, sir. [4]

(Testimony of Clyde W. Henry)

Q. On your statement you do not show the amount of money that you have credited to the company, do you?

A. I believe it is shown back here in contract number one, and this credit on the notes were allowed as credits for the bankrupt.

Q. What credit do you show?

A. It shows approximately \$249.00.

Q. What item is that?

A. "This note paid, and this note partially paid"; they were given full credit.

By Mr. Thomasset:

Q. Do you refer to this amount of \$46.88?

A. Yes, sir.

Q. How much was supposed to have been paid on that contract at that time? A. I would not know.

Q. Was it supposed to be \$249.98?

A. Yes, sir.

Q. You have only given credit of \$46.88, leaving a balance which you have not shown of approximately \$2,000.00? A. That is correct.

Q. So that statement there that there is approximately \$1,600.00 is not correct, is that right?

A. I would not say it was. This was taken from the books.

Q. By Mr. Goggin: But your books only reflect the actual amount of cash you have received and not the credit [5] you have given? A. I could not say.

Q. Well, look it over, this is your statement.

Q. By the Referee: Does your statement show any actual credit?

A. I believe this shows all of the credits, including the credit that was given.

(Testimony of Clyde W. Henry)

Q. By Mr. Goggin: What makes you draw that conclusion?

A. From the information given me by my bookkeeper.

Q. What is her name?

A. Mrs. Hoag gave this to me.

Q. That was a different bookkeeper from the one that was taking care of these books on February the 10th?

A. Yes.

Q. Are you familiar with the writing of the bookkeeper that was your bookkeeper on February the 13th, 1945?

A. Yes.

Q. I will show you a statement and ask you if you are familiar with that writing and if you know whose it is?

A. I believe it is Mrs. Hoag's writing.

Q. Were you present at the time she prepared that statement?

A. No.

Q. Did you give that statement to Mr. Biggy?

A. No. [6]

Q. Did you know whether your bookkeeper gave that statement to him?

A. No.

Q. Have you ever seen that statement before?

A. No.

Q. What did you say the lady's name was?

A. Mrs. Hoag.

Q. How long had she been your bookkeeper?

A. I imagine for about two years, for the U. S. Machinery Company.

Q. Now, she shows as of February 13, 1945, the balance due of \$1,992.64.

Q. By Mr. Thomasset: "When you say she shows," you are assuming something not in evidence; assuming that is a statement made by her, is that it?

(Testimony of Clyde W. Henry)

Mr. Goggin: I will introduce this in evidence as a statement made by Mrs. Hoag.

Mr. Thomasset: Object to it on the ground no foundation has been laid.

Q. By the Referee: Well, were there certain credits that you were to allow, Mr. Henry?

A. There were credits allowed them but I don't know the amount.

Q. Of what nature, was that property turned back?

A. No, these expenditures that the engineer testified had been made. They were allowed. [7]

The Referee: I believe since it has been admitted that these were entitled to be received as credit, then there should be a complete statement, and we will go into that.

Mr. Goggin: It shows a credit allowed on contract number 4774, that must be the tractor, \$2,500.00, of \$185.47, does that refresh your memory?

A. No. I have no knowledge whatever of this type of statement.

Q. By the Referee: What does that show the balance due as of February the 10th on the tractor?

A. It shows on the tractor—

The Referee: On the other, either one.

Mr. Biggy: \$1,162.00.

The Referee: The witness has testified it was only \$849.67, and on the other contract \$1,622.48.

Mr. Thomasset: We have certain notes here which have been introduced as to what the payments had been, and I imagine I shall have no difficulty in determining how much credit has been allowed.

(Testimony of Clyde W. Henry)

The Referee: We will let a statement come in and then if there is any question see if you can adjust it with counsel.

Q. By the Referee: Now, what happened to this equipment which you possessed?

A. It is stored at San Andreas to the best of my knowledge. [8]

Q. By the Referee: Has it been resold?

A. We had sold it directly, previous to the time of taking it off of the property and the man went up to take it and was stopped from doing so and I took it on our own initiative to recover it, in order that we could sell it.

Q. Is it being used now by the person to whom you agreed to sell it?

A. No. To the best of my knowledge it is being stored there.

Q. The deal is not to go through until you clear this matter up? A. Correct.

Mr. Goggin: Q. Did you sell that equipment, purportedly, on or about January the 5th?

A. I believe about that date. I could give you the exact date if I could refer to my notes.

Mr. Thomasset: All right.

Mr. Heffron: Mr. DeMichelis is in court, the man who bought this property.

Mr. Goggin: Q. Is he the man who removed the property?

Mr. Heffron: That is the information I have.

The Witness: It was January 7, 1946.

(Testimony of Clyde W. Henry)

Q. And you purportedly sold that to whom?

A. Mr. DeMichelis.

Q. For what price? [9]

A. I sold him the trommel machinery and the bulldozer for \$3,700.00.

Q. What did he pay you for that?

A. \$3,700.00.

Q. When was that?

A. At the time I gave him the bill of sale.

Q. And when was that? A. January the 7th.

Q. And that was before you had possession of the property.

A. That was our property at all times; before we had actual possession.

The Referee: Any other questions?

Mr. Goggin: I would like to examine Mr. DeMichelis, if we have time.

The Referee: We might have a few moments. You may step down, Mr. Henry.

(Thereafter, Mr. DeMichelis was examined and other proceedings were had.) [10]

Quartz Crystal Products Company.

April 9, 1946.

First Meeting of Creditors; Order to Show Cause on Various Parties.

(Excerpt Taken from Proceedings.)

CLYDE W. HENRY,

being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Thomasset:

Q. Mr. Henry, I am now proceeding backward and taking the last things first. With reference to the pump, that has been the subject of testimony by Mr. Biggy and Mr. Collins, I am speaking now of the pump that accompanied the trommel. What kind of motor was that?

A. That was a 30 horsepower C. S. Westinghouse.

Mr. Goggin: I move the answer be stricken and object to the testimony on the ground that no proper foundation has been laid, whether or not the witness has ever seen the pump.

The Referee: You can bring that out on cross examination, he said that is what it was.

Q. By Mr. Thomasset: Mr. Henry, are you connected in any capacity with the U. S. Machinery Company?

A. Yes, sir.

Q. The U. S. Machinery Company is a corporation, is it not? A. Yes, sir. [11]

Q. What is your capacity?

A. I am the president.

Q. Have you any other capacity with reference to that corporation? A. You mean as general manager?

Q. Well, are you the general manager?

A. Yes, sir.

Q. Are you familiar with the equipment that is described in the lease which has been marked here Trustee's Exhibit 2, and that is the lease which covers the trommel and conveyor and the Byron Jackson pumping motor and

(Testimony of Clyde W. Henry)

the three-tooth rooter? Are you familiar with that machinery? A. Yes, sir.

Q. Were you familiar with it at the time the lease was executed?

A. Yes, sir, I had charge of the purchasing of it.

Q. Now that pump was for what purpose?

A. That particular pump that reference is made to, I inspected, to the best of my recollection, some time in the month of September in the year that this equipment was being made ready for the Quartz Crystal. The reason it was brought to my attention was it had been purchased or agreed to be purchased from another machinery company, at the cost of \$500.00, in the as is condition.

Mr. Goggin: Just a moment. I can not help but make a motion to strike this testimony and object to it as being [12] incompetent, irrelevant and immaterial and hearsay testimony and not binding upon the bankrupt of the trustees.

The Referee: This is the pump in question that was going to be purchased by another company?

The Witness: That is right, it was in our shop in Sacramento.

By the Referee: Q. Were you not going to buy it, if you had it, or were you?

A. It was on our floor and I didn't want to give the purchase order out for it until I knew where it was going and why.

The Referee: Well, I will overrule the objection. It does not really hit on this; but I will overrule the objection.

(Testimony of Clyde W. Henry)

Mr. Thomasset: Q. Will you describe it?

A. I was informed by Mr. Biggy and Mr. Luciendes that this pump was for the yard and that it had been accepted and been rejected by a—

Mr. Goggin: I move to strike that as hearsay.

The Referee: Yes. Just go ahead and tell what you know about it.

A. I said we were not going to purchase that pump unless it was sold, because pumps are an article you could have a hundred of and they still would not have the correct head or delivery, but they assured me it was sold.

The Referee: Q. Your two representatives? [13]

A. Yes, sir.

By Mr. Thomasset: In other words, the pump has to be considered with reference to its use.

A. Yes, sir.

Mr. Goggin: I move the testimony of the witness be stricken for the reason it is hearsay and not binding on the bankrupt.

The Referee: Well, I am going to overrule it. After all what we have here, Mr. Henry, is your contract which is clear, and then we have the testimony of the two parties who preceded you, who said that they said to your representatives, "We will have to have a pump that will do so and so," and they were assured that it would, and apparently it didn't produce, and then complications arose from there on. Your information is that from information you were given by your two salesmen who came in contact with these purchases, that they made an outright sale without any representations.

(Testimony of Clyde W. Henry)

The Witness: Your Honor, I can explain to you very easily why the pump didn't perform as they wanted it to.

The Referee: Yes, but it is your contention, I assume, from what your salesmen told you, that they took the pump and accepted it and there was no guarantee it would produce 1,000—

The Witness: Yes, my men represented to me it was satisfactory to the customer before I bought it.

The Referee: Go ahead.

The Witness: Later this matter was brought to my [14] attention by Mr. Biggy and I took it on myself to prove either the merits or dismerits of their claim, and when I went up there, and Mr. Collins demonstrated the pump to me, I learned it was partially a mud pump rather than a water pump. I am satisfied the pump they took out of my place would easily produce.

Q. By the Referee: Did you see the pump?

A. Yes, sir.

Q. At the time you saw it was it pulling 20 per cent of solids?

A. Yes, sir.

Q. What conversation did you have with him in that connection?

A. I was with Mr. Collins and had no conversation at all because that was previous to the time Mr. Biggy got in contact with me and tried to make the change.

Q. Well, did you make any observations that it was producing a thousand gallons a minute and would pull 20 per cent solids?

A. No, sir, I had no reason to. It had been changed and it was then producing 1,000 gallons to the 20 per cent solids.

(Testimony of Clyde W. Henry)

Q. Your opinion is that that pump as it was delivered, with the motor attached, lifting 50 feet would produce 1,000 gallons per minute? A. Yes, sir. [15]

Q. But they apparently hooked it up to produce solids in conjunction with it, and then it would not perform?

A. Yes, sir.

Q. So your position is that if the representations were made by your men that it would, with the hookup, produce a thousand gallons per minute, then that it would and could produce that amount? A. Yes, sir.

Mr. Thomasset: I will show you Trustee's Exhibit 14, which is a list of alleged expenses. Are you familiar with the work that was done on the pump and motor after it was delivered to the Quartz Crystal Company?

A. I am not too familiar, because I didn't go down to the pump itself, I am very familiar with the type of pump.

Q. And there is a payroll due on there?

A. Yes.

Q. And how much with reference to the payroll would it take to make the change?

A. I would say a mechanic and his labor could make that for about \$18.00.

Q. You are referring now to this item of \$36.15. You feel this work could be done for \$18.00?

A. Yes, sir, I do.

Q. Then there is the item of the pulley and the belt of \$69.43, what is your estimation of a reasonable value of that? A. About \$60.00. [15-A]

Q. And then the transportation item to and from San Francisco?

A. Well, the transportation from San Andreas would not amount to that.

(Testimony of Clyde W. Henry)

Q. Mr. Henry, I will now show you Trustee's Exhibit 1, which is the contract or lease agreement on the Caterpillar tractor and I ask you when that was signed by you on behalf of the U. S. Machinery Company?

A. That was signed on December the 12th, 1944.

Q. And I will show you Trustee's Exhibit 2, which is the trommel and so forth lease agreement, and ask you when that was signed on the part of the U. S. Machinery Company?

A. On the 12th day of December, 1944, I signed it.

Q. And prior to the 12th day of December, 1944, neither of the instruments or agreements had been executed by the U. S. Machinery Company, had they?

A. That is correct.

Q. Now, calling your attention to a telegram which has been introduced in evidence here from Mr. Biggy and has been marked Trustee's Exhibit 9, which is this telegram dated December 31, 1945, from Fallon, Nevada, addressed to Clyde Henry, 285 Seventh Street—

The Witness: Yes, I received the telegram.

Q. You recall receiving that telegram?

A. Yes, sir. [16]

Q. Now, did Mr. Biggy come to your office the Saturday following the sending of the telegram?

A. No, sir.

Q. Did you receive from Mr. Biggy any notice that he would be delayed beyond Saturday after receiving that telegram?

A. No, sir.

Q. And you made a sale, all of this equipment, on what day?

A. No, I didn't make a sale of all of this equipment. I made a sale of part of the equipment on the following

(Testimony of Clyde W. Henry)

Monday or Tuesday, I don't recall which it was; following the Saturday Mr. Biggy was supposed to come in.

Q. And Mr. Biggy came to your office, when?

A. Either the following Monday or Tuesday, I believe Tuesday.

Q. Well, when you say the following—

A. Following the Saturday he was supposed to show up.

Q. Did he come to your office before or after the sale?

A. Afterwards.

Q. Now, you had a conversation with him at that time?

A. Yes, I had quite a conversation.

Q. Did he say anything to you with reference to making any other payments that were then delinquent?

A. No, sir. He said he was still trying to finance [17] the project and that it was unfortunate that he had not notified me that he would be in later in the week. He said he had told Mr. Collins to notify me from Los Angeles that he would be delayed but unfortunately Mr. Collins had not notified me.

Q. Did you receive any notice from Mr. Collins?

A. No, sir.

Q. At the time Mr. Biggy came to your office, did he offer you any money?

A. No, sir.

Q. Did he tell you he had any money to pay over?

A. No, sir.

Q. Now, prior to the sending of this telegram had you had other appointments with Mr. Biggy?

A. Yes. I had had many appointments with him.

Q. With reference to what?

A. With reference to getting the payments on this trommel.

(Testimony of Clyde W. Henry)

Q. And what happened?

A. Each time he felt he would find someone to finance this thing and get it going.

Q. Over what period of time did that occur?

A. From ten months to a year.

Q. And had he theretofore made appointments with you that he had not kept?

A. No, sir. He had kept all of his previous [18] appointments very promptly.

Mr. Thomasset: Now, your Honor, I am going to say that this is all, with this reservation; the agreement in the lease in both instances provides that the lessor may recover costs of recovering and attempt to recover the machinery. The testimony as to the expenses involved can only be introduced through other witnesses whom we did not get down today. Suppose we postpone that in the event it becomes necessary.

The Referee: Very well. If it becomes necessary suppose you submit written agreements of the actual outlay of costs in connection with the recovery. I don't believe that is necessary that we should go to the trouble of witnesses on that. If that point is necessary we can probably agree on that.

Mr. Thomasset: And if we can not agree I imagine we could have a hearing and have, your Honor, hear it?

The Referee: Yes; now as to the attorney fees, that probably would be a different situation.

Mr. Thomasset: We might have to take a deposition of that.

The Referee: I don't quite know the full theory of the trustee's case, but from the standpoint, Mr. Goggin, of the trustee's position, even conceding your position,

(Testimony of Clyde W. Henry)

the U. S. Machinery Company would or would not be a general creditor here?

(Here follows a general discussion between the court and counsel after which the examination of Mr. Henry is resumed.) [19]

Q. By the Referee: When did you resell the property? A. Your Honor, I would say—

Q. Do you have the contract with you?

A. No, sir.

Q. It was sold for cash, was it?

A. It was sold for cash.

Q. All of it? A. Yes, sir.

Q. When was that?

A. I would say the Tuesday following the Friday of the date Mr. Biggy was to come in.

Q. When was the date of that? Now here is a telegram that came from Fallon, Nevada, dated December the 31st. Now, we can figure out what day of the week December the 31st is.

The Witness: That would be a Tuesday, I think.

The Referee: Now, it says "Delayed here until Friday, will be in to take up Quartz Crystal Products obligation Saturday." Now, what is that Saturday?

A. Apparently that would be January the 5th. I would say either January the 7th or January the 8th I sold the bulldozer and the trommel.

Q. To whom and for how much?

A. To Mr. Pete DeMichelis.

Q. I think he was here, wasn't he?

Mr. Thomasset: Yes, your Honor, and he exhibited the bill of sale. [20]

Q. For how much?

(Testimony of Clyde W. Henry)

The Witness: \$3,750.00, I believe, either \$3,700.00 or \$3,750.00.

Q. That was f.o.b. at the mine?

A. Yes, right where it was.

Q. What was the reason for the delay in the execution of the contracts on your behalf?

A. Which contracts?

Q. Exhibits 1 and 2, the original ones.

A. They were mailed to Mr. Biggy and they got back to our office on or about December the 10th and I signed it on December the 12th and we mailed it to San Andreas to be recorded.

Q. They bear date of November the 10th, 1944, and a notarial acknowledgment on November 14, 1944, and then the notarial acknowledgment of your secretary December 12, 1944. You are of the opinion that the signed contracts by the buyers were not received back in your office until about December the 10th?

A. That is right.

Q. And you thereupon signed them and recorded them on December the 8th, 1944. Did a letter accompany them?

A. That I could not say because they telephoned me in San Francisco that the contracts had been received and I went to Sacramento and signed them.

Q. When was the down payment made on the contracts [21] which are dated November the 10th, 1944?

A. That I could not say.

Q. When was the property delivered?

Mr. Goggin: The checks are in evidence, your Honor.

A. Well, the main part of it was not delivered until after Christmas, I am sure of that because it was brought to my attention that they were very slow on delivery. It

(Testimony of Clyde W. Henry)

is fixed in my mind that it was at Christmas time that I went to Sacramento in an effort to speed up delivery to the Quartz Crystal.

Q. Now, here is also an invoice, two invoices, the sales invoice of some kind—a trommel and pump on October the 4th, 1944, and one for a Caterpillar, October the 4th, 1944.

A. Well, originally part of that was to be paid by cash but later the entire deal was changed.

Q. Here is a check September the 22nd, 1944, for \$100.00, and here is another September the 26th, 1944, for \$625.00, that is noted "Initial payment, Caterpillar Tractor," and here is another dated November the 8th, 1944, "Initial installment on mining equipment for \$834.02, and another of \$8.28, dated November the 8th, 1944; November the 18th, \$311.30, balance due on initial contract"; December the 9th, 1944, \$193.75, "December the 14th, 1944, payment on lease contract"; and December the 16th, 1944, \$70.60. Do you have a recollection of those? [22]

A. That was the amount of the original negotiations. The pump and some of this equipment was to be bought outright and bought for cash, then the deal was changed from time to time until it was finally all put on a lease contract.

Q. I am showing you Trustee's Exhibit 5, that is one of your usual forms? A. Yes, sir.

Q. And the contract says, "Balance payable 10 payments of \$249.08 monthly," that is dated October 4, 1944, what is the full sales price?

A. \$3,640.00 on this particular one.

(Testimony of Clyde W. Henry)

Q. And then there is some tax item added?

A. Yes, sir.

Q. Then what were they to pay down?

A. That would have been according to this, if it had been paid.

By Mr. Goggin: Q. Do you know who forwarded or sent the contracts, Exhibit 1 and 2, to the Quartz Crystal Products Company?

A. Either Mr. Stockley or Mr. Euciendes.

Q. Isn't it a fact that at that time the contract, Exhibit 1, dated November the 10th, 1944, was sent to Quartz Crystal Products Company that that was already signed by Mr. Stockley on behalf of the U. S. Machinery Company?

A. Mr. Stockley had no authority to sign contracts.

Q. That is not the question. Will the reporter please [23] read the question.

(Thereupon the last question was read by the reporter.)

A. To the best of my knowledge it had not.

Q. Do you know Mr. Stockley's signature?

A. No, sir.

Q. You don't? A. No, sir.

Q. How long was he an employee of yours?

A. About six months.

Q. Directing your attention to the exhibit, do you know who struck the name of Stockley off the contract?

A. No.

Q. Did you? A. No.

Q. You did not? A. Not to my knowledge.

Q. Not to your knowledge? A. That's right.

(Testimony of Clyde W. Henry)

Q. When did Mr. Stockley leave your employ?

A. I could not tell you the exact date. I believe it would be some time in the early part of 1944.

Q. Do you know his writing at all?

A. No, I don't.

Q. Have you ever seen it? A. I might have.

Q. How many contracts were prepared on this transaction? [24] A. I have no actual knowledge.

Q. Was there more than one?

A. When you say contracts, do you mean contracts of this type?

Q. Yes. A. I could not just say.

Q. Who would know in your office?

A. Mrs. Hoag would know. She was the bookkeeper at that time.

Q. By the Referee: Well practice would dictate one for you and one for the buyer, would it not?

A. That is correct, your Honor.

Q. Unless you would have to have another one for some purpose or other. Now, when you send something to the County Recorder's office it takes weeks to get back?

A. Some things; only some times when it arrives at the County Recorder's office they make a note of it and then make it as of that date.

Q. Oh, yes, but I thought may be there were more.

A. There are, Mr. Thomasset has a copy.

Q. By Mr. Goggin: Now, you say you received contracts back about December 10th?

A. That is correct.

Q. How do you fix that date?

A. Because I had brought pressure on the Sacramento [25] office to have this contract drawn right and have it

(Testimony of Clyde W. Henry)

recorded, because it had come to my attention that this outfit was not too reliable.

Q. Did you contact them from Sacramento?

A. Yes.

Q. Who did you talk to?

A. Mr. Stockley and the bookkeeper.

Q. When was that, about December the 10th?

A. I would say it was before that.

Q. How much before?

A. I had talked to them every day for 15 days previous to December the 10th, that is in general conversation. I always made it a point to mention that this contract had not been received in time to have it recorded.

Q. Had you received at or about that time, the note which evidenced the payment on the contract?

A. That I could not say. The note would be attached to the contract.

Q. And had you known that at or about that time you had received on the contracts approximately \$2,000.00?

A. I didn't know the exact amount we had received but I knew they had received money on the contracts, yes, sir.

Q. And up to December the 9th, I show you Exhibit 3, which checks appear to have your endorsement thereon, if you will look at them, they will appear to be approximately \$2,000.00, will they not? [26]

A. Yes, that is correct.

Q. So then on or about December the 10th, when you were in San Francisco you received the contracts then?

A. No, sir. I received a telephone call that the contracts had been received.

(Testimony of Clyde W. Henry)

Q. Where did you receive that?

A. In my office in San Francisco.

Q. Then what did you do?

A. I went to Sacramento.

Q. Then what did you do?

A. I signed the contract and had it notarized.

Q. By whom did you have it notarized?

A. I believe the man across the street.

Q. He was no employee of yours? A. No.

Q. Did you think it was necessary to have your signature notarized?

A. I knew it was absolutely necessary.

Mr. Goggin: I see.

Q. Since the court asked you a question about whether or not a letter accompanied the sending and delivering of these contracts, and your answer was that you didn't know.

A. That is correct.

Q. Did you make any inquiry about it at your Sacramento office? A. No. [27]

Q. As a matter of fact, Mr. Henry, those contracts were in your Sacramento office shortly after November 14th, 1944, were they not? A. No, sir.

Q. You are quite sure of that? A. Yes.

Q. Did you make any search for them in your office?

A. No, sir.

Q. And you say you contacted whom?

A. Mr. Luciendes, Mr. Stockley, and Mrs. Hoag, the bookkeeper.

(Testimony of Clyde W. Henry)

Q. Did they advise you that they had sent any correspondence to the Quartz Crystal Products Company with respect to them?

A. I could not say. They said they were doing every thing to get them so we could have them, and they could be recorded.

The Referee: I think at this time we will take a recess.

(Thereupon a recess was taken after which the witness, Clyde Henry, resumed the stand and the following proceedings were had):

Q. By Mr. Goggin: Now, when did you say that you first made demand at your office in Sacramento to get the contracts?

A. It would be impossible to say the date but I would [28] say no less than a half a dozen times previous to December the 10th, 1944.

Q. A half a dozen times? A. Yes.

Q. How long would that be, a week, ten days, or what, that is the first time you made demands for them?

A. I used to talk to Sacramento often, not less than four or five times a day on different matters and as I testified, I had the pressure on to get this contract consummated.

Q. When was the first time you told the Sacramento office to get the contracts?

A. I would say, to the best of my memory, November the 25th or 26th.

Q. And you personally made no contact with the Quartz Crystal Products people? A. That is right.

(Testimony of Clyde W. Henry)

Q. Now, you said the reason that you were putting the pressure on was because you had learned of their financial responsibility, that it was not too sound?

A. I had been told by some of the dealers that it was not too good, that is correct.

Q. Now, on a direct question from the court you stated that the delivery of this equipment was not had until about December the 21st, how do you explain that?

A. I have reference to the main part of the equipment, [29] I believe that was the trommel and the stacker.

Q. In other words, on or about December 25th you still had possession of the major portion of this equipment?

A. That I could not say but I know the deal was not completed. I don't know whether it was the Quartz Crystal people who contacted me or my own people, but they were dissatisfied with the delivery; that they wanted that stuff delivered.

Q. When did you sell out your business in Sacramento?

A. I believe about six or seven months ago we sold out the Sacramento business.

Q. When did you have the auction up there?

A. We had three or four at different times.

Q. When was the first one?

A. The first one I think was in 1941 or '42.

Q. When was the next one? A. About 1943.

Q. And the next one?

A. Then we had two more. I believe one was 1944 and one was in 1945. That is we had two separate locations in Sacramento, one at 1800 20th Street and one at 921 Del Paso Boulevard.

(Testimony of Clyde W. Henry)

Q. Now, you sold out the principal part of your business in November, 1944, in Sacramento?

A. No, sir, we sold out the principal part of our business in 1945. [30]

Q. When in 1945?

A. I can not tell you the exact date, I would have to refer to my records.

Q. Now, you said that you sold only a part of the equipment that was on the conditional sales contracts purportedly to Pete DeMichelis. A. Yes.

Mr. Thomasset: There is no such testimony.

Mr. Goggin: I will strike the "purportedly."

Mr. Thomasset: I am not objecting to the "purportedly"; I am objecting to the conditional sales contract.

Q. You sold it for cash? A. Yes, sir.

Q. By Mr. Goggin: And you received cash?

A. Either \$3,700.00 or \$3,750.00.

Q. That was paid to you by cash or by check?

A. By cash.

Q. And at that time there was due on the entire contract, pursuant to our stipulation not more than \$2,214.15 plus interest? A. That is correct.

Q. How much did you sell the Caterpillar for?

A. The Caterpillar was included with the trommel in the \$3,750.00.

Q. Was there a breakdown at all?

A. No, sir. [31]

Q. What part of the equipment did you not sell?

A. Pump and the three tooth rooter.

Q. Where was the three-tooth rooter?

A. That I could not say.

(Testimony of Clyde W. Henry)

The Referee: Now to keep the record straight, there is certain equipment that is identified in the two contracts. That property which you sold was the trommel and the Caterpillar? A. Yes, sir.

Q. And the rest you did not sell?

A. That is correct.

Q. Or remove? A. That is correct.

Q. Unless the sheriff removed it?

A. That is correct.

Q. That is, it did not come into your possession or any of your agents? A. Correct.

Mr. Goggin: Q. Now, all of the equipment you purportedly sold to DeMichelis was not taken off the property, was it?

A. The Caterpillar was removed and the belt I believe, and some minor equipment.

Q. Was the trommel? A. Correct.

Q. You at one time made a valuation of the equipment, did you not? [32] A. Yes.

Q. What was your evaluation?

Mr. Thomasset: I will object to that as immaterial.

The Referee: As of what time, or what is this Mr. Goggin, do you mean at the time the suit was filed?

Mr. Goggin: On or about November the 1st, 1945.

Mr. Thomasset: We will object to that.

The Referee: Overruled. I don't know. This is preliminary apparently to something. You can have a motion to strike if it is not tied in.

A. You have a letter there, if I could look at that letter it would refresh my memory, because a lot of things happen in this work and I could be mistaken.

(Testimony of Clyde W. Henry)

Mr. Goggin: I imagine you refer to this (hands instrument to the witness.)

The Witness: A. I remember this letter very well.

Q. You wrote that letter?

A. Yes, I wrote that letter.

Q. And who is Mr. Gottsfield?

A. I don't know.

Q. He is the person who Mr. Biggy was discussing the purchase and sale of the entire property to, was he not?

A. He is the gentleman Mr. Biggy asked me to write this letter to.

Q. And isn't he the gentleman who advised you by telephone he would pay off the entire contract?

A. That is a misstatement. He is a gentleman who [33] advised me he had made no arrangements to pay off the contract.

Q. Did you talk to him? A. Yes.

Q. When?

A. On the Tuesday following Mr. Biggy's visit to my office following the sale to DeMichelis.

Q. Now, as a matter of fact, the bill of sale you gave to DeMichelis was dated around January the 15th, wasn't it? A. It could be.

Mr. Thomasset: We have a record of it. It was read into the record by your Honor.

The Referee: Let's see if I made a note of it. Of course, the reporter's record would be more reliable.

Mr. Thomasset: He said he might want to sue someone and we asked that that contract be left and I could not get him to leave it.

(Testimony of Clyde W. Henry)

The Referee: (Reading) "DeMichelis, Railroad Flat, Calavares County, California, January the 15th, took possession. Caretaker gave me the keys and I moved the equipment. Paid \$3,700.00."

Mr. Thomasset: That is what he said?

The Referee: "Everything but the tractor moved by four o'clock, tractor removed between four and six." Now, I have January the 15th is the date which he took possession. I don't know about the bill of sale. We did make reference to it when it was produced and I read it into the record. [34]

Mr. Thomasset: I think that is correct, your Honor.

The Referee: Is it your recollection that it bears the date of January the 15th?

Mr. Goggin: Yes, your Honor, he had it acknowledged, as I recall, on or about that date.

Mr. Thomasset: Oh, yes, I think it is dated, according to my note, January the 8th. My notes are a bit ambiguous so I would not state that positively, but I do recall that he stated later on that he had it acknowledged because he might have to use it.

By Mr. Goggin: Q. Now, getting back to this conversation with Mr. Gottsfield, was Mr. Biggy in the office at the time you talked to him? A. No, sir.

Q. Was Mr. Biggy present at any time when you talked with Mr. Gottsfield?

A. Not that I know of.

Q. When Mr. Biggy was in your office on January the 7th or 8th didn't he advise you at that time that he had sufficient money to pay off your contract in full?

A. He did not. He advised me that he had hoped to get some money.

(Testimony of Clyde W. Henry)

Q. And isn't it a fact that Mr. Biggy told you he could sell the tractor and pay off the entire amount that was due you? A. It is not a fact. [35]

Q. What was your opinion of the value of the tractor on or about January 8th?

A. I would say the tractor at that time was worth about \$1,700.00.

Q. What was your opinion as to the value of all of the equipment on the mine?

Mr. Thomasset: Which equipment do you mean; that covered by the leases or what was at the mine?

Mr. Goggin: Everything that is covered by the leases.

A. Well, in order to be specific, when you say covered by the leases, is that our leases?

Q. Yes. A. The pump and the trommel and—

The Referee: Let me suggest a change in that question.

Mr. Goggin: Very well. I will withdraw the question.

Q. By the Referee: Do you have an opinion of the value of the equipment that you sold on these contracts here, which remains and which you did not sell to Mr. DeMichelis? A. Yes, sir.

The Referee: I am excluding the trommel and tractor for the purposes of discussion. What is the value of the remaining property?

A. The value of the pump and motor and rooter, I would say, was about \$1,000.00.

The Referee: You were showing the witness some letter, I don't think it was offered. Did you intend to offer it? [36]

Mr. Goggin: Well, I was just asking as to his opinion of the value.

(Testimony of Clyde W. Henry)

Q. By Mr. Goggin: Now, what was your opinion as to the value of all of the equipment that was located on the Quartz Crystal Mine?

Mr. Thomasset: That question is ambiguous.

The Referee: Yes.

Mr. Goggin: Showing you a letter dated November 1, 1945, signed by yourself and addressed to Mr. Gottsfield, wherein you stated that in your opinion the value of the Quartz Crystal Mining equipment, located near Calavares, California, "My estimate of the value of the plant would be \$35,000.00, and I would state further that the equipment should bring not less than \$18,000.00 to \$19,000.00 at a forced sale."

A. I wrote this letter at the request of Mr. Biggy to help him raise money to pay off this equipment. I don't know what was on there on November the 1st; however, I do know at the time I inspected the Quartz Crystal property, when all of the equipment was on there and in running condition, I would say it was as I stated in this letter, that it should bring \$18,000.00 or \$19,000.00 at a forced sale.

Q. And was that your opinion on or about January the 8th?

A. I don't know what was there on January the 8th.

Q. When was the last time you were on the lease?

A. I imagine sometime in August or September. Anyway, [37] it was previous to the time the Quartz Crystal had shut down operations.

Q. Did you go up on the property subsequent to November 1, 1945?

A. No, sir.

(Testimony of Clyde W. Henry)

Q. And you don't know whether any of the property was removed after November 1, 1945, or not?

A. That is correct.

The Referee: That leaves me somewhat confused, because you have referred to all of the property, and of course we are only concerned with this property under the two contracts.

Mr. Goggin: I was going to ask him, what part of the equipment—

The Referee: Well, the question really is, is it not, from someone who could identify it, if it is important, what equipment was there on the mine other than that under these two contracts, because he is apparently giving the overall. I don't quite see the connection here unless he knew what that other equipment was.

Mr. Goggin: Maybe I can clear that up.

Q. What was your opinion of the value of the equipment covered by your conditional sales contracts, dated November 10, 1944, on November 1, 1945, arriving at the total valuation of \$35,000.00.

Mr. Thomasset: I object to that, it is ambiguous.

The Referee: Yes. Afterall, here is what I gave so far: [38] He sold the Caterpillar and the trommel for \$3,700.00. We will take that as the value. That is a good indication for the time being. Then you asked him what was his opinion of the other property and he said \$1,000.00. That makes \$4,700.00.

Mr. Goggin: The point is this: Mr. Collins testified that the value of that equipment was \$9,000.00 on or about January the 8th, and according to this witness' testimony, it would be \$4,700.00, and I was attempting to have his opinion as of November the 1st, as to whether

(Testimony of Clyde W. Henry)

or not he has changed it from that date, and whether or not it was around \$9,000.00, as I understand his statement to have been to a certain person. Of course, I appreciate the fact if you sell a certain piece of equipment and get cash for it—

The Referee: If the point was material here and I was trying to find out what the situation was up there, I would call Mr. Collins and ask him what pieces of property of every kind and character was on the mine on November the 1st, in addition to this contract prepared by Mr. Henry, or the U. S. Machinery Company. I assume there was some other property. And then he might be able to give an idea of its value or cost, if it was expensive.

Mr. Goggin: That would be our rebuttal.

The Referee: Yes. Well, this witness—unless he knows exactly what was there.

Q. By the Referee: When you put the estimate on the plant, and that I assume was a going plant, the machinery [39] up there on November the 1st, what generally was there in addition to the property under your contracts?

A. As near as I can recall, there was a station wagon, one yard shovel, and I believe two dump trucks, a machine shop complete, and an assay room and welding equipment, and the equipment we had sold these people, all installed.

Q. In other words, a complete—

A. A complete going operation, your Honor.

Q. By Mr. Goggin: Now, on January the 7th or 8th, when Mr. Biggy came into the office, did you tell

(Testimony of Clyde W. Henry)

him the amount of money you were selling the Caterpillar and trommel for? A. Yes.

Q. And did you tell him at that time that would pay up his account and you would turn over to him the balance of the money? A. No, sir.

Q. Did you make any offers subsequent to that date?

A. Yes. I told Mr. Biggy if it was possible at all for him to get his finances, I felt he could make a deal with Mr. DeMichelis and carry on his operation up there, that I had requested Mr. DeMichelis not to remove the equipment immediately; in fact, I called him after Mr. Biggy was in my office and Mr. Biggy said he would contact Mr. DeMichelis and try to make a deal with him.

Q. Do you remember the price or figure that was quoted? [40] A. No, sir.

Q. Was it \$4,750.00?

A. I believe \$4,750.00 was mentioned as the amount that Mr. DeMichelis would take to leave the whole equipment there and get his equipment somewhere else.

Q. And that state of facts existed up to the time when you filed this action in claim and delivery did it?

A. No, sir. When Mr. Biggy didn't contact Mr. DeMichelis, Mr. DeMichelis notified me he would have to have the equipment and would hold me responsible to go ahead and deliver it to him.

Q. When was that, about January the 15th?

A. That would be about then.

Mr. Goggin: I think that is all.

The Referee: Any other questions?

Mr. Thomasset: I was looking at the dates that these actions were filed in Calavares County, for claim and delivery. I think it was around the 21st of February.

(Testimony of Clyde W. Henry)

Q. By Mr. Thomasset: Mr. Henry, are you familiar with any Federal Regulations as to nonpayments on machinery of this type sold under the deferred payment plan or lease plan?

A. Yes, sir, I am familiar with the Federal Law on down payments on a lease contract, yes, sir.

Q. And what is that?

Mr. Goggin: Object to that as incompetent, irrelevant [41] and immaterial, and a self-serving declaration, and not the best evidence. If there is a regulation, the regulation is the best evidence. I suppose it requires a one-third down and the balance over a period of time.

Mr. Thomasset: That is right. Will you so stipulate that I can so prove it without introducing anything except the conversation of the parties.

Mr. Goggin: I think the contracts call for one-third down but there was a regulation to that effect, was there not? A. Yes, sir.

The Witness: Yes, sir but I had a conversation with Mr. Biggy.

The Referee: How is that going to affect the record?

Mr. Thomasset: We have scattered payments and these have been gone into by your Honor, yourself.

Q. Mr. Thomasset: When did you get the balance of the one-third down?

A. At the time I signed the contract.

Q. Do you want to take a look at these records here and determine when you got that?

The Referee: I see. That explains the reason for some of those checks being prior to the date of the contract.

Mr. Thomasset: Yes, your Honor.

(Testimony of Clyde W. Henry)

Q. Mr. Thomasset: Now, take a look at these checks, can you tell what checks represent the balance of the one-third [42] down payment?

Mr. Goggin: There are two contracts, counsel.

Mr. Thomasset: They both bear the same date and I don't think they are segregated here.

Mr. Goggin: I think if you will look carefully you will find the differential.

The Witness: This is the check I received.

Mr. Thomasset: Q. You are indicating check number 260, dated September 9, 1944, for \$193.75.

A. That is correct.

Q. When did that reach you?

A. On December the 10th.

Q. With anything else, that you recall, at that time?

A. With the contracts. When I say reached me, they were in the Sacramento office and they were handed to me.

Q. Now, with reference to the deal with Mr. De Michelis, was there any conversation with him as to delivery?

A. Yes, there was quite a bit of conversation with Mr. DeMichelis as to the delivery, do you want me to explain?

Mr. Thomasset: Yes. I want to know whether at the time you made the sale or agreement—

A. I showed Mr. DeMichelis the contracts we had with the Quartz Crystal Company, and I also showed him a wire from Mr. Biggy, that Mr. Biggy had given up the property.

(Testimony of Clyde W. Henry)

Q. I am asking you for a conversation with reference to delivery. [43]

A. I can not say but I take it I promised him immediate delivery, or inferred he could have immediate delivery, because it was our equipment.

Q. Was there any conversation with him as to whether you were going to provide the delivery, or what?

A. He was to pick it up but I gave him the bill of sale as a guarantee that the equipment was mine and that I would make delivery to him.

Q. So it was subject to delivery?

A. Yes, sir. I also explained to him that that was the contract and should there be any delay, that I would not want to be held responsible for it and he acquiesced in that.

Mr. Thomasset: That is all, I think.

Q. By The Referee: Did you have any conversation with him or discuss with him the possibility of after your taking his \$3,750.00 that the Quartz Crystal might not want to release the equipment and might pay you the balance, or any thing of that sort?

A. No, your Honor, I told him that the time had long past that they could legally make any payment or have any claim on the equipment, but it had been our experience in years gone by, especially where people had contracts, with mine owners, they frequently will put in, if they don't meet certain obligations, the machinery will belong to the mine owners: we have had that happen many times and we have always had to go and put up a bond and have an attorney get the equipment for us. [44]

(Testimony of Clyde W. Henry)

Q. I thought when you were here before you said you told Mr. DeMichelis you really were not selling it to him, it was conditioned upon your being able to get it, I don't remember exactly what it was, but you had some qualification so that if you didn't get delivery of it, Mr. DeMichelis could not hold you.

A. That was the point. I didn't want to obligate ourselves.

Q. If there was something of that sort then Mr. DeMichelis was not to be able to hold you and sue you for nondelivery?

A. That was my point.

Q. And you could give back the \$3,750.00?

A. That's correct.

The Referee: Any more questions?

Mr. Thomasset: No more questions, your Honor.

Mr. Goggin: That is all.

The Referee: Now, there are one or two matters raised that I am not clear on—I am not clear on this contract and its execution; from Mr. Biggy I gathered that the contract was signed down here on the date indicated before a notary, and I thought from what he implied that, right after it was signed, on November 10, 1944, he mailed it back to the Sacramento office. Now, on the other hand, it is quite clear from Mr. Henry's testimony that he was checking with his Sacramento office continuously and it didn't get there until [45] December the 10th; was not received. That is one situation I would like to have cleared up, if there is anything on it. It is more or less of a void; and the other thing is the conversation between Mr. Henry and Mr. Biggy in connection with this appointment, which apparently was not kept, and then also the third

(Testimony of Clyde W. Henry)

point, whether or not this pump was raising 20 per cent solids with the liquid. Let's see if we can clear that matter up by 4:30. (Thereafter Mr. Biggy took the stand and testified until court was adjourned.) [46]

* * * * *

Quartz Crystal Products Company

August 2, 1946, at 2:00 p. m.

Order to Show Cause in Reclamation

(Excerpts from Proceeding)

CLYDE W. HENRY

being first duly sworn, on oath testified as follows;

Direct Examination

By Mr. Thomasset:

Q. You have appeared here before and testified?

A. Yes, sir.

Q. And you are the president of the U. S. Machinery Company?

A. Yes, sir.

Mr. Chichester: I would like the record to show I am appearing as co-counsel with Mr. Goggin, and that he has handled all of the proceedings heretofore, and he is ill, and I am not too familiar with the proceedings but I will do my best under the circumstances.

The Referree: All right.

Q. By Mr. Thomasset: Mr. Henry, I call your attention to what purports to be a lease contract which bears the date of November 10, 1944, and which has been admitted into evidence heretofore as Trustee's Exhibit 1, and which bears a recordation stamp dated December 18, 1944; that recordation stamp being or purporting to be that of the recorder of [47] Calavares

(Testimony of Clyde W. Henry)

County. Now, you have already testified in this matter and I want to call your attention to the notarial acknowledgment that is attached to that Exhibit 1, and ask you if you recall the occasion when that exhibit was acknowledged before the notary?

A. I recall the date when it was acknowledged.

Q. The notary appears to be N. W. Hicks, is that correct? A. That's right.

Q. And it is Mr. or Mrs. or Miss. A. Mr.

Q. Does Mr. Hicks have a place of business anywhere?

A. Yes, sir, he has a place of business right across from 921 Del Paso Boulevard, North Sacramento.

Q. Did you, on the day that the notarial acknowledgement bears date, to wit: the 12th day of December, 1944, appear before Mr. Hicks? A. Yes, sir.

Q. And did you have with you the lease contract which is marked Trustee's Exhibit 1?

A. Yes, sir.

Q. Now, when you appeared before Mr. Hicks, the notary, did the signature, Clyde Henry, president, under U. S. Machinery Company, on this lease contract, marked Exhibit 1, have at the time you appeared before the notary—had that signature been affixed to that instrument? [48]

A. No, sir. I signed it in the presence of Mr. Hicks.

Q. So that this signature, Clyde Henry, appearing under U. S. Machinery Company, and also in pen and ink below, the signature, Clyde Henry, president, was affixed by whom? A. By myself.

Q. And that is your signature? A. Yes.

(Testimony of Clyde W. Henry)

Q. And you are the president of the U. S. Machinery Company? A. Right.

Q. On what date did you affix that signature?

A. On the 12th day of December, 1944.

Q. And you were acting in what capacity on that occasion?

A. As president of the U. S. Machinery Company.

Q. And for and on behalf of the U. S. Machinery Company? A. Yes, sir.

Q. Now, did you on that occasion have any other instrument? A. Yes, sir.

Q. What?

A. I had this particular contract you are now looking at.

Q. Now, we are looking at the instrument which has been marked Trustee's Exhibit 2?

A. Yes, sir. [49]

Q. And which bears on the reverse side of it a rec-
ordation of the recorder of Calavares County as of the
18th day of December, 1944, is that right?

A. Yes, sir.

Q. I will ask you to look at the signature, Clyde Henry, and then the word president underneath that, which has been written under the U. S. Machinery Com-
pany, at the bottom on Trustee's Exhibit 2, whose sig-
nature is that? A. Mine.

Q. Did you affix that yourself? A. Yes, sir.

Q. On what date did you affix that signature on Trustee's Exhibit 2?

A. On December the 12th, 1944.

(Testimony of Clyde W. Henry)

Q. And in what capacity were you affixing that signature?

A. As president of the U. S. Machinery Company.

Q. And for and on behalf of the U. S. Machinery Company? A. Yes, sir.

Q. Now, on that occasion, do you remember whether it was in the morning or the afternoon, or what?

A. To the best of my recollection it was in the afternoon; I would say about 2:30.

Q. Were you accompanied by anyone else?

A. Yes, sir. [50]

Q. By whom? A. Mr. Harry Satterfield.

Q. At the time that you appeared before Mr. Hicks, the notary, on the 12th day of December, 1944, with the instrument which has been marked Trustee's Exhibit 2, had the signature of Clyde Henry, president, been affixed at that time?

A. No, sir, not previous to that.

Q. And it was, as you have testified, signed by you in the presence of the notary? A. Yes.

Q. And on that date? A. Yes, sir.

Q. Do you recall what you did, after these two exhibits, 1 and 2, were notarized by the notary? Were they returned to you?

A. Yes, sir, they were handed right back to me by the notary.

Q. And did you do anything in connection with those exhibits or copies of the exhibits, to the best of your recollection?

A. The copies of the exhibits I mailed to the Quartz Crystal Company, and the original I mailed to the recorder in San Andreas.

(Testimony of Clyde W. Henry)

By Mr. Thomasset: That is all.

The Referee: Do you have any questions? [51]

Mr. Chichester: Yes, your Honor.

Q. By Mr. Chichester: Who is Mr. H. D. Stockley?

A. He was a man who worked for me; one of the superintendents of the plant.

Q. Where did he work on December the 12th, 1944?

A. At Del Paso Boulevard, North Sacramento, in my shop.

Q. What kind of a position did he hold?

A. Superintendent.

Q. Of the shop? A. Yes.

Q. The U. S. Machinery Company is a corporation, is it? A. Yes, sir.

Q. Apparently his signature appears on Trustee's Exhibit 1 and is scratched out, is that correct?

A. Yes.

Q. Who scratched it out? A. I did.

Q. And when did you do that?

A. When I signed it, on December the 12th, 1944.

Q. Did you sign Exhibit 2 on December the 12th, also. A. Yes, sir.

Q. Did it have any signature on it when you received it? A. No, sir.

Q. By Mr. Thomasset: The question is a little vague.

The Witness: I took it for granted you meant did it have [52] Stockley's signature on it.

Q. Yes. A. It did not.

Q. Referring to the material referred to in Exhibit 1, had the material called for in that instrument been delivered to Mr. Buell, or Mr. Biggy, or Mr. Collins?

(Testimony of Clyde W. Henry)

Mr. Thomasset: I think that has been gone into.

The Referee: Yes, it has been covered.

Mr. Chichester: No other questions.

Q. By The Referee: You were selling this type of machinery under the price ceilings of the Office of the O.P.A., were you not?

A. Yes, sir. All of our machinery—The O.P.A. had a lease price and also a sales price; this was sold under the lease price.

Q. Was the reason—I believe the tractor, that is on a separate contract? A. Yes, sir.

Q. Is that on Exhibit 1 or Exhibit 2?

A. One.

Q. That tractor was delivered way back—in other words, the property under that contract was delivered back in September, was it not?

A. Yes, sir. The reason for that was we had it on a lease contract to a man by the name of—he is a fellow who has a sawmill, I just can not recall his name, but we had it [53] leased to him and these people were negotiating for the lease on it, and rather than bring it into Sacramento we had it delivered to their property, which made a saving of 200 miles of drayage—Ken Knutting was the man's name; he had a sawmill near Placerville.

Q. The first payment was made a way back then, was it not?

A. Yes, sir, apparently that was when it was negotiated.

(Testimony of Clyde W. Henry)

Q. Why did you wait until November or December to make out the contract?

A. Well, with reference to the preliminary negotiation on it—I had nothing to do with it; I had the o. k. on it when it came to the final conclusion.

Q. They did make a deal to buy it from you at a certain figure and they made payments to you of quite a bit of money a way back, and apparently there was no contract prepared at that time, is that right?

A. Yes, sir.

Mr. Thomasset: Just for the purpose of the record, your Honor, is talking about buying and selling, these are lease contracts.

The Referee: All right; we will change it to lease contracts instead of buying and selling.

Q. Why was it that the contract was not prepared sooner? [54]

A. Well, they didn't know exactly what and how much of this equipment they were going to need or use.

Q. This had nothing to do with other equipment; this tractor was a separate deal, on a separate contract, was it not? A. Yes, sir.

Q. Were you waiting until they had made enough down payments to comply with O.P.A. regulations?

A. That could have been the reason, I am not exactly clear on that.

Q. The other contract, the property was not all ready for delivery at the inception of the deal, was it?

A. That is correct.

The Referee: Well, I guess that covers that. Are there any other questions?

Mr. Chichester: No questions.

(Testimony of Clyde W. Henry)

Mr. Thomasset: No questions. Mr. Henry, you may step aside.

Mr. Thomasset: Mr. Satterfield, would you take the stand, please.

HARRY SATTERFIELD

having been first duly sworn on oath, testified as follows:

By Mr. Thomasset:

Q. Your name is what? A. Harry Satterfield.

Q. What is your address? [55]

A. My business address?

Q. Yes.

A. It has been 503 Van Ness Avenue, San Francisco, but that property has been sold and we have changed our address, but that is what it was at that time.

Q. Do you know Mr. Clyde Henry, who preceded you on the stand? A. I do.

Q. Do you recall being with him in Sacramento on an occasion in 1944? A. I do.

Q. I want you to look at these two instruments, one of them has been marked Trustee's Exhibit 1, and the other has been marked Trustee's Exhibit 2, each one has affixed to it a notarial acknowledgment, bearing the signature of N. W. Hicks, do you recall being in Sacramento with Mr. Henry at any time when you saw those exhibits? A. I was in Sacramento at that time.

Q. You were? A. Yes, sir.

Q. And do you recall being at Mr. Hick's place of business? A. Yes, sir.

Q. What kind of a business did he have?

A. A gasoline business.

(Testimony of Harry Satterfield)

Q. What does he have, an office there? [56]

A. He has an office off to the side there.

Q. Do you recall the date, independently of these contracts?

A. Well whatever date that paper was—

Q. Do you remember seeing those instruments, by instruments I mean these two papers which have been marked Trustee's Exhibit 1, and Trustee's Exhibit 2. Now, let's take a look at Trustee's Exhibit 1, and I call your attention to the signature, Clyde Henry, president, underneath U. S. Machinery Company, did you see Mr. Henry affix that signature?

A. Well, I saw him take those papers in there while we were getting gasoline. They both of them signed, this gentleman, the notary, and Mr. Henry; I didn't know he was a notary at the time though.

Q. What about Trustee's Exhibit 2, calling your attention to the signature, Clyde Henry, president, under U. S. Machinery Company; were you present at the time Mr. Henry affixed that signature?

A. Yes, sir.

Q. Was that at the same time that the notary signed that acknowledgment?

A. They both signed.

Q. They both signed at the time? A. Yes, sir.

Q. You were not exactly in the office were you when Mr. Henry signed? [57]

A. No, I was sitting in the car.

Q. You were in the car; about how far away?

A. About 15 feet; the gasoline pumps and the car and then the office.

(Testimony of Harry Satterfield)

Q. When you say you saw Mr. Henry sign both of these instruments, what do you mean; what, if anything, attracted your attention?

A. As he got out of the car he had the papers; they looked like they were legal papers; I saw him take them out of his pocket and walk over to the office; I was in a hurry to get to San Francisco and they spent a lot of time in the office and I said, "What was all the time for?" And he said, "I have to get these signatures on this lease." At that time I was going to buy machinery, a shovel.

Q. You are in that kind of business?

A. Yes, sir. I was trying to get a shovel, a tractor, and a bulldozer, and also a rooter.

Q. When he came back did you take a look at the contracts?

A. I said, "What did you take all of the time about?" and he said, "Here is the title on some of the machinery you wanted, but it is sold."

Q. Now, were these signatures apparently freshly written at the time you looked at them?

A. Yes, sir.

Q. Do you know what I mean? [58]

A. Yes, they were fresh. They just was writing them.

Mr. Thomasset: That is all.

Q. By the Referee: You were in the car and he went into the office, a little room where the notary was, some 15 feet or so away?

A. That is right.

(Testimony of Harry Satterfield)

Q. And then apparently he signed these papers and had the notary affix the seal? A. Yes, sir.

Q. And came back out? A. That's right.

Q. Well, you don't know anything about what the document showed or contained, do you? He didn't take the papers out of his pocket when he came back, did he?

A. No; when he came back, he said, "Here is some of the stuff you were trying to buy."

Q. But he had already sold it? A. Yes, sir.

Q. Counsel's question seemed to imply that you saw these instruments and very carefully scrutinized them.

A. Well, I did take a look at some of the prices.

Q. The Referee: He showed you his contracts when he came back? A. Yes, sir.

Q. And his signatures were already on them?

A. Yes, sir. [59]

The Referee: I see. Any other questions?

Mr. Thomasset: No other questions.

Mr. Chichester: No other questions. The witness is excused.

Mr. Thomasset: Your Honor, I ask the privilege at this time to take the deposition, by written interrogatories, of the Notary, and for that purpose I would like to have photostatic copies made of both of them.

The Referee: Is that disputed? Your main point is he went in there at that time and signed the papers at that time.

Mr. Thomasset: That they were not signed prior to that.

Mr. Chichester: They were not signed on the date the instruments bear?

Mr. Thomasset: No; on the date the acknowledgment bears.

The Referee: You know, of course, that is what the Notary will testify to?

Mr. Thomasset: That is right,

The Referee: I don't believe you have to go to that trouble.

Mr. Chichester: I don't think the Trustee will object to that. I don't think it has a scintilla of objection.

The Referee: Well, certainly the Trustee has nothing to the contrary to show, that I have heard.

Mr. Thomasset: Then can it be stipulated that it shall be deemed that the Notary, N. W. Hicks, has been called [60] and testified that Trustee's exhibits "1" and "2" were signed before him; and by signing I mean the signatures of Mr. Henry as they now appear, were signed before him on that date, that is the 12th day of December, 1944?

The Referee: I think the Trustee should agree to that. I will take that as the evidence, in lieu of the deposition.

(Thereafter there was further discussion between the Referee and counsel, after which court was adjourned)

[Endorsed]: Filed Mar. 6, 1947. [61]

[Endorsed]: No. 11705. United States Circuit Court of Appeals for the Ninth Circuit. William I. Hefron, Trustee of the Estate of Quartz Crystal Products Co., a limited partnership composed of Raymond I. Biggy, John W. Buol and James F. Collins, Bankrupt, Appellant, vs. U. S. Machinery Company, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 12, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11705

WILLIAM I. HEFFRON, TRUSTEE FOR QUARTZ
CRYSTAL PRODUCTS CO., a limited copartner-
ship composed of RAYMOND I. BIGGY, JOHN
W. BUOL and JAMES F. COLLINS, Bankrupt,
Appellant,

vs.

U. S. MACHINERY CO.,

Appellee.

DESIGNATION OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD TO
BE PRINTED

I.

Appellant hereby designates and adopts as its points on appeal the points heretofore set forth in its statement of points on which appellant will rely on appeal filed in the District Court of the United States for the Southern District of California, Central Division, on the within appeal.

II.

Appellant does hereby designate and adopts for printing the certified transcript of the record as filed by the

Clerk of the United States District Court, Southern District of California, Central Division, on the within appeal.

Dated this 8th day of September, 1947.

GEORGE T. GOGGIN

Attorney at Law

817 H. W. Hellman Building

354 South Spring Street

Los Angeles 13, California

MUtual 2248

Attorney for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 10, 1947. Paul P. O'Brien,
Clerk.

No. 11705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of Quartz
Crystal Products Co., a limited partnership composed of
Raymond I. Biggy, John W. Buol and James F. Col-
lins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

GEORGE T. GOGGIN,

817 H. W. Hellman Building, Los Angeles 13,

MARVIN WELLINS,

720 Subway Terminal Building, Los Angeles 13,

Attorneys for Appellant

FILED

DEC 17 1947

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No. 11705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of Quartz
Crystal Products Co., a limited partnership composed of
Raymond I. Biggy, John W. Buol and James F. Col-
lins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Issues Involved.

I.

That the conditional sales contracts between the bankrupt and the U. S. Machinery Company are invalid and void as to the Trustee and as to the creditors of the bankrupt under and by virtue of the provisions of Section 2980 of the Civil Code of the State of California, in that the said contracts were not recorded within the time prescribed in said Section.

II.

That the amount due the U. S. Machinery Company by the bankrupt under said contracts was the sum of

\$2,368.15, and the receipt of \$3,700.00 by the said U. S. Machinery Company from the sale of the equipment under said contracts left a surplus due and owing to the Trustee and the estate herein in the amount of \$1,331.85.

Statement of the Case.

On January 28, 1947, an order was made by the Hon. Hubert F. Laugharn, Referee in Bankruptcy, upon the Petition in Reclamation of appellee. [Tr. pp. 57-58.] Appellee had sought possession of certain machinery and equipment in possession of appellant. [Tr. pp. 14-19.] The said order of January 28, 1947, determined that the said personal property was an asset of the bankrupt estate; that appellee was not entitled to possession thereof, and that there was owing by the appellee to the appellant the sum of \$1331.85.

Appellee filed a Petition for Review on the sole grounds:

“that each of said agreements was executed on December 14, 1944, and recorded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is erroneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said Petition for Reclamation of this petitioner.” [Tr. p. 60.]

On June 6, 1947, the Hon. Leon R. Yankwich, Judge of the United States District Court, filed a written opinion in the above-entitled case, together with an order wherein the prior order of the Referee, dated January 28, 1947, was reversed. [Tr. pp. 123-124.] From that order, appellant has taken this appeal. [Tr. p. 135.]

Statement of Facts.

The bankrupt was engaged in the development, maintenance, and operation of a mine in Calaveras County, California, from which quartz, crystals, and other minerals were extracted.

In September, 1944, the bankrupt entered into two separate and different *oral* contracts with appellee, for the purchase and sale of certain mining equipment and machinery. On September 22, 1944, the bankrupt paid appellee the sum of \$100.00 upon one of the said oral contracts covering the purchase of

- 1 Trommel, complete as inspected, including trunions, chain, sprocket and thrust roller,
- 1 100-ft. Conveyor, 24", complete with belt,
- 1 Byron Jackson Pump and Motor,
- 1 3-tooth Rooter. [Tr. p. 159.]

On November 10, 1944, the oral contract covering the aforesaid mining equipment and machinery was reduced to a written conditional sales agreement by appellee, for the total purchase price of \$3,645.00 plus sales tax, and on that date the bankrupt paid to appellee the sum of \$834.02, as part payment on said contract. [Tr. pp. 66-70, 159.] Said contract was signed by Raymond L. Biggy, one of the partners of the bankrupt, on the same date; John W. Buol and James F. Collins, the other two partners of the bankrupt, signed and executed said contract on *November 14, 1944*. [Tr. p. 117.]

On November 14, 1944, said contract was mailed to the appellee at its office in Sacramento, California. [Tr. p. 117.]

Said contract was not recorded by appellee until December 18, 1944, in Calaveras County, California. [Tr. p. 70.]

Delivery of the mining machinery and equipment covered by said contract was made in two different loads to the mine of the bankrupt, the last being delivered on November 16, 1944.

On September 26, 1944, the bankrupt paid appellee the sum of \$625.00, covering the purchase of one "60" Caterpillar Tractor No. PA-3361, with 10-foot dozer blade. [Tr. p. 159.] On September 29, 1944, said tractor was delivered to the mine of the bankrupt. On November 10, 1944, the oral contract covering said tractor was reduced to a written conditional sales agreement by the appellee, for the total purchase price of \$2500.00 plus sales tax. [Tr. pp. 61-65.] Said contract was signed by Raymond I. Biggy, one of the partners of the bankrupt, on the same date, and the other two partners signed and executed the same on November 14, 1944, on which date said contract was mailed to the appellee at its office in Sacramento, California. [Tr. pp. 46, 54.]

Said contract was not recorded by appellee until December 18, 1944, in Calaveras County, California. [Tr. p. 65.]

The bankrupt had creditors who had no actual knowledge of said contracts and who became creditors of the bankrupt while said property covered by both contracts was in possession of the bankrupt and before said con-

tracts were recorded, and who are still creditors with provable claims filed in the bankruptcy proceedings. [Tr. p. 55.]

The total purchase price, including sales tax, on the mining machinery and equipment covered by the two contracts, amounted to \$6,298.62. [Tr. pp. 61 and 66.] Payments on said contracts were made by the bankrupt in various installments, and at the time of the filing of the bankruptcy proceeding there was due appellee on said contracts the sum of \$2,368.15. [Tr. p. 166.]

On January 8, 1946, appellee informed one of the partners of the bankrupt that it had sold portions of the personal property covered by the said conditional sales contract on January 7, 1946, to one Pete De Michelis for \$3,700.00 said property, however, then being in the possession and control of the bankrupt. [Tr. pp. 173, 174; 39.] Appellee informed said partner of the bankrupt that it could get the property back from the said Michelis by the payment of \$4,700.00, or a \$1,000.00 bonus; appellee stated that it had sold said property to Michelis with the understanding that appellee might not be able to make delivery thereof. At that time bankrupt was in default on payments under the terms of said conditional sales contract.

No notice of forfeiture of the interest of the bankrupt under said conditional sales contracts was given by appellee prior to the purported and attempted sale to Michelis. [Tr. p. 56.] Michelis thereafter tried, unsuccessfully, to

get possession of the property, and on February 21, 1946, appellee filed certain claim-and-delivery actions in the Superior Court of the State of California, Calaveras County, alleging that on that date it was the owner and entitled to possession of all the property covered by the two conditional sales contracts, and that there was then due under one of the contracts the sum of \$849.67, and under the other contract the sum of \$1,622.48, although at that very same time appellee had in its possession the said sum of \$3,700.00 paid by Michelis on January 7, 1946. [Tr. pp. 79-86; 93; 100; 148.]

No trial has been had on the said claim-and-delivery actions. Appellee has submitted to the jurisdiction of this court to try the issues therein involved by reason of its Petition for Reclamation. [Tr. pp. 14-19.]

Appellant has elected to adopt the aforesaid sale made to Michelis by appellee for the sum of \$3,700.00. [Tr. p. 56.] After payment of the balance due appellee, as aforesaid, from the \$3,700.00 in its possession, there is a balance of \$1,331.85 due appellant. [Tr. p. 56.]

The foregoing Statement of Facts is in substance identical to the Findings of Fact of the Referee in Bankruptcy herein [Tr. pp. 53-57], and it is upon these facts that the Honorable District Court Judge based his aforesaid order of June 6, 1947.

It is particularly noteworthy that the appellee has admitted in its Petition of Reclamation that the conditional sales contracts were made and entered into on November

Specification of Errors.

Appellant respectfully submits that the Honorable District Court erred in holding that the aforesaid two conditional sales agreements were recorded by appellee within twenty days from execution, as required by Section 2980, California Civil Code.

Statement of Jurisdiction.

Jurisdiction on this appeal is derived from the following:

Bankruptcy Act, Sec. 24(a);
28 U. S. C. A., Sec. 225 (Judicial Code, Sec. 128);
General Order XXXVI.

Specification of Errors.

Appellant respectfully submits that the Honorable District Court erred in holding that the aforesaid two conditional sales agreements were recorded by appellee within twenty days from execution, as required by Section 2980, California Civil Code.

Statement of Jurisdiction.

Jurisdiction on this appeal is derived from the following:

Bankruptcy Act, Sec. 24(a);
28 U. S. C. A., Sec. 225 (Judicial Code, Sec. 128);
General Order XXXVI.

10, 1944. Paragraphs III and IV of appellee's petition expressly set forth these admissions. [Tr. pp. 14 and 15.] In addition, the appellee, in its complaint in claim and delivery filed in the Superior Court of the State of California, in and for the County of Calaveras, Case No. 3172, against the bankrupt, admitted, in Paragraph IV thereof, that the conditional sales contract relating to the Caterpillar tractor was made and entered into on *November 10, 1944*, and that said tractor was delivered on that date to the bankrupt. [Tr. p. 94.]

Furthermore, appellee in its claim and delivery complaint against bankrupt in said county for the remaining equipment, case No. 3171, admitted again, in paragraph IV thereof, that the conditional sales contract relating to that equipment was made and entered on *November 10, 1944*, and that said equipment was delivered to the bankrupt on said date. [Tr. p. 80.]

It is also noteworthy that not only do the conditional sales contracts themselves acknowledge receipt of part payment on the purchase price, but Mr. Clyde W. Henry, president of appellee, admitted that for fifteen days prior to December 10, 1944, to wit, since on or about November 25, 1944, he knew that he had received approximately \$2,000.00 in part payment on these two contracts. [Tr. p. 162.]

It is also significant that the invoices by which appellee sold the equipment in question to the bankrupt are dated October 4, 1944. . [Tr. pp. 71-73.]

POINT I.

The Conditional Sales Contracts Between the Bankrupt and the U. S. Machinery Company Are Invalid and Void as to the Trustee and as to the Creditors of the Bankrupt Under and by Virtue of the Provisions of Section 2980 of the Civil Code of the State of California, in That the Said Contracts Were Not Recorded Within the Time Prescribed in Said Section.

Section 2980, Civil Code of California, as it relates to the case at bar, provides as follows:

“ . . . Every conditional sales contract . . . must be acknowledged . . . and must be recorded *within twenty days after* its execution in the county where *the buyer* . . . respectively resides at the time *he executes such contract* . . ., or in case *the buyer* . . . is a non-resident of the state, in the . . . county . . . where the property involved is located at the time the contract . . . is executed by *the buyer* . . . otherwise it shall be void as to the lien . . . of the seller . . . against . . . those having no actual knowledge of the contract . . . who become *creditors of the buyer* . . . while said property is in the possession of . . . (the buyer).” (Italics ours.)

Appellant respectfully submits that “execution” as used in said statute means execution by the *buyer alone*—and does not include execution by the seller, under a conditional sales contract.

The purpose of Section 2980, Civil Code, is to protect the creditors of the buyer of mining machinery and equipment in whose place appellant stands in this case.

As stated in *Wheeler v. Kraner*, 21 Cal. App. (2d) 460, quoting *In re Great Western Petroleum*, 16 Fed. Supp. 247:

“The object of the section was to protect purchasers in good faith, encumbrancers, or those who had extended credit to a person in possession of such equipment against unrecorded claims of sellers under a conditional sales contract.”

This purpose is reaffirmed in the *Wheeler* case, at page 463, in the following language:

“The object, of course, of the Legislature, was and is to protect persons dealing with operators of mining property when the equipment and machinery used thereon is bought on conditional sales contract.”

Furthermore, in the case of *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, in commenting on the invalidity of former Section 2980, Civil Code, as it existed in 1931, the Court said:

“5. There probably would have to be inserted a provision limiting the application of the statute to those dealing with the buyer and excluding those dealing with the seller.”

Thus, Section 2980 is a legislative aid to creditors of persons buying mining equipment on conditional sales contracts. Its object is not to aid the seller of such mining equipment to evade the law by refraining from signing conditional sales contracts, thus delaying the date within which recordation is required, but rather to require recordation at the earliest moment of effective consummation of the conditional sales contract between the parties.

Nowhere does Section 2980 mention the seller of the conditional sales contract as a person whose signature is necessary in order to effectuate "execution." The statute is replete with references to the *buyer*, as indicated in our italicized quotation above.

It is therefore respectfully submitted that where, as in the case at bar, a seller has actually delivered possession of mining equipment to a buyer under a conditional sales contract and has delivered such contract to the buyer, and the buyer has executed the same and delivered the same to the seller, together with payment on account of said contract, the contract must surely be deemed executed within the meaning of Section 2980, Civil Code.

It is elementary that the nature of an instrument is determined by its legal effect and not by what the parties call it. (*Smith v. Grove*, 47 Cal. App. (2d) 456.) Thus, in the case at bar, the two agreements in question are conditional sales contracts, and both the Referee and the District Court have so found. It is therefore immaterial that the documents on their face are described as leases.

It is respectfully submitted that the conditional seller cannot under such circumstances be permitted to succeed in its present claim since it withheld signature from the conditional sales agreement and thereby delayed the commencement of the twenty-day period within which recordation is required to be made. For to allow such a specious claim on the part of the conditional seller would be to afford an opportunity for fraud on the creditors of the buyer, exactly contrary to the intention of the Legislature in enacting this statute.

Not every so-called contract requires a signature by both parties to accomplish "execution." For example,

it is obvious that a bill of sale, or a promissory note or a deed is fully effective upon signature by one party and delivery of the document to the other party.

This general rule has been recognized from an early date. In 6 R. C. L. 640, 641, the following is stated:

“Even contracts which were at common law required to be in writing and under seal were not required to be signed. . . . But the fact that one of the parties has signed the contract does not require that the other party should do likewise. A written contract not required to be in writing is valid if one of the parties signs it and the other acquiesces therein. Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it. (*Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386; *Sellers v. Green*, 172 Ill. 549; 50 N. E. 246.) Bills of sale, promissory notes, and many other writings are signed by one of the contracting parties and delivered to another who receives the same and orally or by conduct acquiesces therein.”

California has recognized the principle that execution of certain contracts may require the signature of only one party thereto. In *Luckhart v. Ogden*, 30 Cal. 547, 548, it was held as follows:

“The execution of the contract was not denied by the defendants, but expressly admitted; but the objection raises the question of its validity, because it was executed by only one of the parties to it. The answer to this objection is, that the consideration for the defendants’ covenants contained in the contracts executed by them was rendered and performed by the plaintiff by the conveyance to them of his interest in the mine, and thus was completely

executed, while on their part the consideration for such conveyance was still to be rendered and performed, and thus was executory. The contract did not provide for the performance of anything by the plaintiff, and therefore it was not necessary he should sign it. The judgment of the Court is that the contract was well executed.”

Similarly, it has been held that a chattel mortgage is valid without the affidavit of the mortgagee. *Pacific States Savings & Loan Company v. Hoffman*, 134 Cal. App. 604.

See also:

Bell v. Central Bank, 89 Cal. App. 551.

The Honorable District Court, in its opinion herein, relies upon a reference from 33 C. J. S. 121, to support the position that execution of a conditional sales contract requires the conditional vendor to sign the same. However, the very reference cited by the Honorable District Court states in part as follows, in defining the term “execution”:

“. . . in fact, in every application of the word, there is, when it is used in its strict sense, the same meaning, namely, that of completing or performing what the law either orders or validates.”

Thus, each case depends upon its particular facts to determine what is the criterion of the term “execution.”

For the Honorable District Court to state that the mere use of the term “execution” imports the necessity of the conditional vendor’s signature to the contracts herein involved, is in effect an *assumption* of the very matter in issue, rather than the *resolving* of the issue.

Section 1776, California Civil Code expressly provides that the unpaid seller of goods loses his lien thereon when the buyer lawfully obtains possession of the goods, as happened in the case at bar.

This result is in accordance with the doctrine of *Wheeler v. Kraner*, *supra*, and with the provisions of Section 3440, Civil Code, which, together with Section 2980, Civil Code, were designed to protect creditors of the buyers of mining machinery under conditional sales contracts. It is incumbent upon a conditional vendor who wishes to preserve his lien on mining equipment, therefore, to comply strictly with Section 2980, Civil Code—and not to thwart its obvious purpose by withholding signature from the document, to avoid the commencement of the twenty-day recordation period.

There is no injustice to the conditional vendor in this requirement, for even if he has no lien on the property in question, he still has a right, as an unsecured creditor, to be paid the purchase price therefore. (Sections 1772 and 1773, Civil Code.)

Consistent with this interpretation of Section 2980, Civil Code are other related cases where the signature of one of the parties to a contract was deemed unnecessary under the circumstances.

In *California Jewelry Company v. Provident Loan Association*, 6 Cal. App. (2d) 506, it was held that a written memorandum of a jewelry broker's receipt of jewelry from a wholesaler for examination and purchase on wholesaler's approval of his selections became the contract of the parties when signed and delivered by the broker to the wholesaler and accepted by the latter, notwithstanding that the wholesaler's signature was lacking. The Court cited 6 Cal. Jur. 233.

Similarly, in *Winter v. Kitto*, 100 Cal. App. 302, the Court cites with approval from *Cavanaugh v. Casselman*, 88 Cal. 543, 549, as follows:

“It is not the rule that a contract which on its face purports to be *inter partes* must invariably be executed by all whose names appear in the instrument before it will be binding on any. One reason why it is held in many of the cases that an agreement is not to be operative upon one until it has been signed by another, is that such signing is the consideration upon which the first signer agrees to be bound; but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing the agreement than those named in the instrument.”

Also in the *Cavanaugh* case, the Court quotes with approval from Bishop on Contracts, Section 348, as follows:

“‘If by parol stipulation, or *a fortiori* if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who have signed it; but if nothing of this appears the parties signing will be holden though even on the face of it the signatures of others were contemplated by the draughtsman’.”

The same rule is stated in *Kurtz v. Forquer*, 94 Cal. 91.

In *Reedy v. Smith*, 42 Cal. 245, 250, there was a suit on a contract between plaintiff and defendants, whereby defendants were to build a dam. Plaintiff sought damages

for the failure of defendants to build same. The contract was signed by the defendants but not by the plaintiffs. The Court held as follows:

“Under the circumstances revealed by the evidence, I think the Court properly found that the contract had been executed and was binding upon both parties. Both had acted upon it as a binding contract. The plaintiffs certainly have been estopped from denying that it had become binding upon them, had suit been brought upon it by the defendants. At any rate, the fact that a verbal contract, containing precisely the same conditions, was entered into, is admitted, and no question of the Statute of Frauds is raised, and after this distinct admission of the contract could not be.”

In *Gelfan v. Bessolo & Gualano, Inc.*, 125 Cal. App. 214, 218, it was held that in an action on a contract of guaranty there was no error in admitting the contract in evidence over the objection of defendant surety company that the contract was incomplete and not binding because a second surety had not signed, where, from an examination of the contract, it did not appear that said second surety was a necessary party to the contract by its terms or one that was necessary to the contract so that it could be operative. It was further held that there was sufficient evidence in the record to support the finding that the delivery of the contract was not conditioned upon the signing by the second surety, and that where there was at most but a conflict in the evidence, the finding of the trial court would be affirmed on appeal. The evidence showed that plaintiff, a painting contractor, was permitted to substantially perform his contract with the general contractor; and it was therefore held that he was entitled to

enforce the contract guaranteeing payment of the money to him, even though he had not signed it.

In *Melton v. Story*, 113 Cal. App. 609, 611, a contract relating to brokerage commission, whose caption stated it was an agreement between defendants and two other persons and a bond house, was held to have been executed and binding upon the parties under the circumstances. The Court held that the face of the instrument failed to show the signatories signed upon consideration that the other two persons would sign, and that there was an entire absence of all evidence concerning delivery being conditional upon the obtaining of other signatures.

Similarly, in the case at bar there is an absence of any evidence concerning the delivery of the conditional sales contracts by the bankrupt to appellee being conditional upon signature by the appellee.

From the foregoing, it is respectfully submitted that, where a conditional vendee of mining equipment has received such equipment and made part payment thereon and signed the conditional sales contract presented to him by the conditional vendor and mailed the contract back to the vendor, such contract is thereupon to be deemed executed, within the meaning of Section 2980, Civil Code.

Furthermore, it is respectfully submitted that, even if under other circumstances the signature of the conditional vendor might be necessary to accomplish "execution," under the circumstances of the case at bar execution became complete on or before November 18, 1944, by which date the contract had been signed by the conditional vendee, mailed to the conditional vendor, and payment had been made to the conditional vendor thereon and had been accepted as such and the machinery was in the

exclusive possession and control of the conditional vendee.

The above contention is based upon the provisions of Civil Code, Section 3543 and the many cases decided thereunder.

Notwithstanding the deprecation of "equity" principles in the case at bar, by the Honorable District Court in its opinion herein, it is respectfully submitted that such equity principles as are embodied in said Section 3543, Civil Code and cases cited below are an important part of the law of this State and are an effective bar to the claim of the appellee herein that its lien should be protected, notwithstanding that it delayed from November 18, 1944, to December 14, 1944, in signing the conditional sales contracts and notwithstanding that it delayed until December 18, 1944, to record the same.

Section 3543 Civil Code provides as follows:

"Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

In *Meadows v. Hampton Live Stock Commission Co.*, 55 Cal. App. (2d) 634, the Court held that a seller who delivered possession of cattle, together with a brand inspection slip, to a company engaged in the business of selling cattle to public stockyards, and who saw the cattle unloaded and knew that they would be offered for sale to others, was "estopped" from claiming title to the cattle as against innocent purchasers from the company which became insolvent, notwithstanding that the purchasers did not receive a bill of sale describing the cattle and bearing the signatures of two witnesses who had been voters of the county for the last two years, as required by the County

Agricultural Code. The Court relied on Civil Code 3543, and cited:

Wendling, etc., Co. v. Glenwood, etc., Co., 54 Cal. App. 691;

Pacific Finance Corp. v. Hendley, 103 Cal. App. 335;

Snodgrass v. Ricketts, 13 Cal. 359;

Phelps v. American Mortgage Company, 40 Cal. App. (2d) 361, 366;

Camerer v. Cal., etc., Bank, 4 Cal. (2d) 159, 172.

The last two cited cases hold that although the true owner is guilty of no more than misplaced confidence, such misplaced confidence is negligence within the meaning of Section 3543, so as to disentitle the owner to assert his title against an innocent third party who has dealt with the apparent owner.

Another cognate case is that of

Commercial Credit Company v. Barney Motor Company, 10 Cal. (2d) 718,

in which it was held that trust receipts given by retail automobile dealer to obtain advances from finance company to pay distributor for automobiles used for exhibition and sale were valid title retention documents under the Uniform Trust Receipts Law. However, the Court went on to hold that where the distributor had clothed the retail dealer with all the appearances of ownership or authority to sell, he could not be heard to assert title or ownership against a purchaser for value without actual notice of the reserved title, who would be led by appearances created by the distributor to believe that the dealer had authority to dispose of the title in the usual course of

trade. In short, the original title holder was estopped by his own negligence or mistaken confidence. The Court cited *Rapp v. Fred W. Hauger Motors Company*, 77 Cal. App. 417, 422.

See also: *Northern Assurance Co. v. Stout*, 16 Cal. App. 548; *Fidelity & Casualty Company v. Abraham*, 70 Cal. App. (2d) 776; *Freitas v. Marsh*, 70 Cal. App. (2d) 711.

The foregoing cases are consistent with the general maxim of jurisprudence embodied in Section 3521 Civil Code that:

“He who takes the benefit must bear the burden,”

and Section 3522 Civil Code that:

“One who grants a thing is presumed to grant also whatever is essential to its use.”

The foregoing interpretation is also consistent with the principle set forth in Section 3529 Civil Code, as follows:

“That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due.”

In the case at bar, that which ought to have been done was the immediate signing of the conditional sales contract by the conditional vendor on or about November 18, 1944, and the recording of the same within twenty days thereafter. It is respectfully submitted that the law will presume, under the circumstances of this case, that the conditional sales contracts were executed as of November 18, 1944.

This is consistent with the language of the contracts themselves, wherein it is provided that the bankrupt "accept" said contracts in the form set forth therein, as follows:

"Accepted QUARTZ CRYSTAL PRODUCTS Co.

Raymond I. Biggy

James F. Collins

John W. Buol

Dated November 10, 1944."

It is thus clear that the parties intended the contract to be complete when the *acceptance* of the contract was accomplished by the conditional vendee by signing the same and delivering it to the conditional vendor. This occurred on November 18, 1944, more than twenty days prior to recordation by the appellee.

The doctrine of "estoppel," which we respectfully submit should be applied herein to bar the lien claim of the appellee, finds further expression and approval in Section 1589 Civil Code, which provides as follows:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

See: *Estate of Bruce*, 27 Cal. App. (2d) 44; *Tonini v. Ericcsen*, 218 Cal. 43; 6 Cal. Jur. 59.

Section 2980 Civil Code, with whose interpretation we are here concerned, is related to Section 2957 Civil Code, concerning mortgages of personal property or crops. That

section provides that such mortgages are void against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith, unless they are

“ . . . acknowledged, or proved and certified, in like manner as grants of real property”

It is clear from the foregoing statute, as well as from Section 2956 Civil Code, prescribing a model form of personal property mortgage, that no signature of the mortgagee is required in order to obtain a valid mortgage of personal property—just as no signature of a grantee is required on a grant deed of real property. Similarly, it is submitted, the signing of a conditional sales contract by a conditional vendor is not a prerequisite to its validity.

Thus, in conclusion, it is respectfully submitted that neither the language nor the purpose of the statute, nor the conduct of the parties, nor the law relating to similar security transactions, require the signature of the appellee to complete the execution of the conditional sales agreements involved in this case. Furthermore, it is respectfully submitted that in any event, under the circumstances of the case at bar, the appellee is estopped from denying execution of these contracts after November 18, 1944. From this, it is submitted that both of said conditional sales contracts are void under Section 2980 Civil Code, for want of recordation within the requisite statutory period.

POINT II.

The Amount Due the U. S. Machinery Company by the Bankrupt Under Said Contracts Was the Sum of \$2,368.15 and the Receipt of \$3,700.00 by the Said U. S. Machinery Company From the Sale of the Equipment Under Said Contracts Left a Surplus Due and Owing to the Trustee and the Estate Herein in the Amount of \$1,331.85.

It follows from the argument set forth in Point I above that the arithmetical conclusion of Point II should be adopted. There is an additional reason, however, why this result should follow, at least with respect to the mining machinery and equipment which was the subject of the sale to Pete De Michelis, as more particularly set forth in the Statement of Facts herein.

With respect to that personal property, both the appellant and the appellee have now signified their approval of the sale to Michelis of said property for \$3,700.00.

Therefore, whether the conditional sales contracts herein be valid or void, under Section 2980 Civil Code, should not affect the result herein in so far as said property is concerned.

It is therefore respectfully submitted that the order of the Honorable District Court Judge herein should be reversed, and the appellee be ordered to pay to appellant the sum of \$1,331.85, on the ground that the sale of the said mining machinery and equipment to Michelis have been ratified both by appellant and appellee.

Respectfully submitted,

GEORGE T. GOGGIN,

MARVIN WELLINS,

Attorneys for Appellant.

No. 11705.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of Quartz
Crystal Products Co., a limited partnership composed
of Raymond I. Biggy, John W. Buol and James F.
Collins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

APPELLEE'S BRIEF.

CHARLES A. THOMASSET,
319 Story Building, Los Angeles 14,
Attorney for Appellee.

FILED

FEB 2 1948

PAUL P. O'BRIEN, CLERK

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Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

APPELLEE'S BRIEF.

Statement of Facts.

The pertinent facts involved are as follows:

By an instrument dated November 10, 1944, appellee, as lessor, and the bankrupt, as lessee, entered into a lease contract [Tr. p. 61] under the terms of which appellee leased the following machinery to the bankrupt:

1—60 Caterpillar Tractor No. PA 3361, with 10-foot dozer blade.

The lease provided for a total rental of \$2,500.00 and \$62.50 sales tax, of which amount \$818.75 was payable forthwith and the balance of \$1,743.75 in nine monthly installments of \$193.75 each, plus interest.

By another instrument in writing also dated November 10, 1944, appellee as lessor, and the bankrupt as lessee, entered into a second lease agreement [Tr. p. 66] covering the following machinery and equipment:

- 1—Trommel, complete as inspected, including trunions, chains, sprocket and thrust roller;
- 1—100-foot conveyor, 24", complete with belt;
- 1—Byron Jackson Pump and motor;
- 1—3-tooth Rooter.

The lease provided for a total rental of \$3,645.00 plus sales tax of \$91.12, payable \$1,245.32 forthwith, and the balance of \$2,490.80 in ten monthly installments of \$249.08 each, plus interest.

Both of the above mentioned leases provided further:

“The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).” [Tr. pp. 62, 67.]

The leases also provided *inter alia* for repossession by lessor in the event of default by lessee [Tr. pp. 63, 68], and also as follows:

“All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.” [Tr. pp. 63, 68.]

Clyde E. Henry, president of appellee, testified that the main part of the property covered by these lease contracts was not delivered until after December 25th. [Tr. pp. 158-159, 165]; that the Federal regulations on installment contracts required payment of one-third upon execution, and that the balance due on the said down payment was not received until December 10th. [Tr. pp. 175, 176]; that the bankrupt made five installment payments on each contract, the last payment on each being received on April 25, 1945 [Tr. pp. 142, 143]; that the witness received a telegram from Mr. Biggy dated December 31st [Trustee's Ex. 9; Tr. p. 102], advising the witness that Mr. Biggy would call upon him the following Saturday; that Mr. Biggy did not appear on said Saturday; that part of the machinery covered by the leases was sold to Mr. De Michelis on the 7th of January, and that when Mr. Biggy did appear, he did not offer any payment but told the witness that the bankrupt was still trying to finance the project. [Tr. pp. 154, 157.] Prior to the

receipt of the telegram, the bankrupt had been notified that repossession was necessary. [Tr. pp. 73, 74.] This letter was received by the bankrupt who replied by letter dated December 13, 1945. [Tr. p. 74.]

With reference to the sale to Mr. De Michelis, Mr. Henry testified that the sale was contingent upon the ability of the appellee to make delivery [Tr. p. 147]; that when Mr. Biggy finally did appear, after the sale had been made to Mr. De Michelis, Mr. Henry stated to Mr. Biggy that if it were at all possible for Mr. Biggy to get his finances, that he could probably deal with Mr. De Michelis and carry on his operations; that the witness had requested Mr. De Michelis not to remove the equipment immediately and that Mr. Henry thought Mr. De Michelis might take \$4,750.00 to leave the whole equipment there and get his equipment somewhere else. [Tr. p. 174.]

With reference to the negotiations that preceded the execution of the leases Mr. Henry testified that originally the parties discussed payment of part of the equipment in cash but later the entire deal was changed until finally they agreed on the lease contract. [Tr. p. 159.]

With reference to the execution of the lease agreements the record discloses the following:

1. The leases themselves show, by notarial acknowledgments, that the bankrupt acknowledged each one on the 14th day of November, 1944 [Tr. pp. 65, 70], and that the appellee acknowledged them on the 12th of December. [Tr. pp. 64, 69.]

2. The testimony of Clyde Henry, president of appellee, that he signed and acknowledged each of the lease contracts on the 12th day of December, 1944. [Tr. pp. 107-113, 154, 179-182.]

3. The testimony of Harry Satterfield to the effect that Mr. Henry executed each lease agreement in his presence. [Tr. pp. 113-117, 186-189.]

4. A stipulation entered into between counsel that it shall be deemed the notary, before whom appellee executed the lease contract, had been called and testified that each of the said leases was signed before him on the 12th day of December, 1944, by appellee. [Tr. pp. 189-190.]

5. The admission of the bankrupt that the latter signed and acknowledged the leases on November 14, 1944.

Appellant refers to appellee's petition for reclamation and claims appellee has admitted, therein, that the conditional leases were made and entered into on November 10, 1944. What the petition in fact alleges is that "on or about the 10th day of November, 1944," appellee and the bankrupt entered into the agreement of leases involved herein. [Tr. pp. 14, 15.]

Appellant also claims that the claim and delivery complaint filed against the bankrupt admits that the lease agreements were made and entered into on November 10, 1944. What the complaint alleges, however, is quite something else. The allegation is that "that on or about said date," the lease agreements were entered into. [Tr. p. 80, par. IV.]

POINT I.

The Only Contracts Before the Court Are the Written Leases.

It is a little difficult to determine just what appellant is trying to establish by asserting that there were oral contracts between the parties involving the machinery covered by the leases. It is obvious from the foregoing recital of the facts that the parties negotiated prior to the execution of the written leases, and that these negotiations were consummated by the execution of the leases. The latter provides that all previous communications between the parties, either oral or written, with reference to the machinery or to the leases, are superseded thereby. The prior negotiations therefore, never amounted to a completed transaction except as is evidenced by the leases, and that is the uncontradicted testimony of Mr. Henry for the appellee. [Tr. p. 159.]

It is submitted that there is no evidence to support any finding of an oral agreement of sale other than evidence of the usual and customary negotiations which lead to a sale in countless transactions. Moreover, appellant does not rely on an oral agreement in any discussion of the law and appellee therefore assumes that the reference to oral agreement is incidental.

POINT II.

There Is No Admission Herein by Appellee That the Leases Were Executed on November 10, 1944.

Similarly, the assertion by appellant that appellee admitted that the contracts involved were executed on November 10, 1944, is not insisted upon by appellant in its discussion of the law and is apparently abandoned. The answer, of course, is that there is no such admission as reference to the petition for reclamation filed by appellee and to the complaint in claim and delivery will show. In each one the date the leases were entered into is alleged as "on or about" November 10th.

Appellant, moreover, admits that the agreements were not signed by the bankrupt until November 14th, or four days after the date which appears on the agreements. There is no evidence of any sort that the agreements, although dated November 10th, were signed by either of the parties involved on that day, and the evidence on the issue of execution was addressed to the ascertaining of the true date.

POINT III.

The Agreements Were Recorded Within the Time Prescribed by Section 2980, Civil Code of California, and Are Therefore Binding Upon and Valid as to the Trustee and Creditors of the Bankrupt.

A. AS TO EXECUTION:

Appellant is basing its appeal on the ground that execution by the bankrupt, without the signature of the seller, established the beginning of the 20 day period within which the leases had to be recorded under the provisions of Section 2980 of the Civil Code of the State of California.

This contention has been met and discussed by the Honorable District Court, and the opinion thereof, together with the citations of law therein contained, are hereby referred to and adopted by appellee. [Tr. pp. 123 *et seq.*] That opinion is set forth as an appendix hereto.

This point was also discussed by appellee in its points and authorities on petition for review, and reference is hereby made thereto and said points and authorities are hereby adopted by appellee. [Tr. pp. 107 *et seq.*]

It is admitted that each of the agreements was recorded on December 18, 1944. [Tr. pp. 53-54.]

Appellant claims that the agreements should be deemed to have been executed, within the meaning of Section 2980 of the Civil Code, on or about November 18, 1944. (App. Op. Br. p. 19, last par.) But why November 18th? Appellant admits that the agreements were not signed by the bankrupt until November 14th, and the uncontradicted evidence is that appellee did not sign and acknowledge the agreements prior to December 10th, 1944.

Accordingly, if the construction of the statute asserted by appellant is adopted, a conditional vendee may come into court, testify that he signed an agreement not signed by the conditional vendor on a particular date, and then mailed it to the conditional vendor, and such evidence will establish the beginning of the 20 day period within which the contract must be recorded under Section 2980 of the Civil Code. Not only that but, according to the appellant, all that the court need do under such circumstances is to estimate the number of days a letter in ordinary course would require to reach the conditional vendor, and then select that day as the date of execution by both parties—without anything else. For that is exactly what appellant contends and asserts.

Appellant is seeking reversal of the Honorable District Court on the ground that the contracts were not recorded within 20 days after their execution *by the vendee*. The section, however, does not say “within 20 days after signing by one of the parties,” but *within 20 days after execution of the agreement*.

It has been repeatedly held, as the opinion of the Honorable District Court shows, that execution of a bilateral instrument, involves signing by both parties, and delivery. According to the evidence, which is uncontradicted, appellee, after signing the contracts on the 10th day of December, 1944, and acknowledging them at the same time, returned a copy of each to the bankrupt. So there was no delivery to the bankrupt of the contracts involved until sometime after December 10, 1944. The contracts were

recorded on December 18th. According to appellant signing by the conditional vendor and delivery of the contracts is not within the purview of the term "execution" as that word is used in Section 2980 of the Civil Code. Appellant, however, can cite no cases to that effect.

B. AS TO ESTOPPEL:

Appellant claims that appellee is estopped from denying execution as of November 18, 1944. There is no finding of fact or conclusion of law asserting an estoppel and the Referee's order does not purport to be based upon an estoppel. Nor, is it submitted, is there any evidence upon which a claim of estoppel can be based.

There is a finding to the effect that the bankrupt had creditors who had no actual knowledge of the said contracts and who became creditors of the same bankrupt while the said property was in the possession of the bankrupt and before the contracts were recorded. [Tr. p. 55.] Is that the basis upon which the claim of estoppel is predicated? The record is not clear on the subject, but if appellant is making such a claim then appellee desires to point out that the finding is a conclusion. Moreover, Section 2980 of the Civil Code does not provide that a conditional sales contract is invalid if not recorded within 20 days after the conditional vendee acquires possession of the property involved; and, if it did, then the evidence is to the effect that the property covered by the agreement involved herein was not completely delivered until approximately December 25, 1944. What the code section provides, and it is a technical point now which ap-

pellant attempts to invoke, is that the contracts are void as to creditors if the contract is not recorded within 20 days after its execution.

Section 2980 of the Civil Code does not provide an estoppel as to creditors who become such during the period of 20 days between execution of the contract and its recordation. If the contract is recorded within the period of 20 days then the contract is valid against the creditors who become such during that period, even though they have no knowledge of the contract and the property is in the possession of the conditional vendee. There is nothing in the code section which provides that the contract is invalid if the property covered by the conditional contract is delivered prior to recordation. All that the section provides is that the contract must be recorded within 20 days after its execution, otherwise it is void as against the creditors who become such without knowledge of the contract while the property is in possession of the buyer. The finding of fact therefore with reference to the existence of creditors is not only a conclusion but is without meaning, for the existence of creditors, prior to recordation of the contracts, and while the property is in the possession of the buyer, is of no avail to them if recordation is made within 20 days after execution; hence the existence of creditors and possession by the vendee *ipso facto* creates no estoppel.

POINT IV.

There Is Nothing Due the Bankrupt Estate.

Appellant argues that the contracts being invalid because they were not recorded within 20 days after execution, and appellee having sold a portion of the property for a sum greater than the balance due on the contract, which sale by the way occurred prior to the filing of a petition in bankruptcy, the trustee can affirm the sale and claim the difference between the amount due and the amount of the sale. That, of course, assumes that the contracts are invalid under Section 2980 of the Civil Code. Which brings us back again to the interpretation of the word "execution" and what constitutes execution of the contracts. Determination, therefore, of the question of validity of the contracts by reason of recordation or non-recordation under the provisions of Section 2980 of the Civil Code determines the right of the trustee to affirm the sale to Mr. De Michelis and claim the difference between the amount for which the property was sold and the balance due under the contracts.

It is submitted that the order of the Honorable District Court should be affirmed.

Respectfully submitted,

CHARLES A. THOMASSET,

Attorney for Appellee.

APPENDIX.

[Title of District Court and Cause]

OPINION

Appearances:

Charles A. Thomasett, Esq., Attorney for U. S. Machinery Co., Los Angeles, California.

George T. Goggin, Esq., Attorney for Trustee, Los Angeles, California.

Yankwich, District Judge:

On January 28, 1947, the Referee made an Order in the above matter upon the petition in reclamation of the U. S. Machinery Company in which the petitioner sought possession of certain machinery and equipment in the possession of the Trustee. The Order determined that the personal property was an asset of the bankrupt estate, that the petitioner was not entitled to its possession, and that it owed to the Trustee the amount of \$1331.85. The basis for the Order was that two agreements in writing entered into by the U. S. Machinery Company and the bankrupt dated November 10, 1944, and not recorded until December 18, 1944, were invalid under Section 2980 of the Civil Code of the State of California. This is a petition to review the Order.

The Referee in his certificate on review admits that the petitioner has correctly set forth his ground for review in this language:

“That petitioner alleges that each of said agreements was executed on December 12, 1944, and recorded on December 18, 1944, and is valid as to the

Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is erroneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner.”

A study of the memorandum opinion which the Referee filed convinces me he arrived at the wrong conclusion, because he misinterpreted the meaning of the phrase “its execution” in Section 2980 of the Civil Code of California, the material portion of which reads:

“Every conditional sales contract, lease, and bailment or feeder agreement covering live stock and other animate chattels and every conditional sales contract of equipment and machinery used or to be used for mining purposes, must be acknowledged, or proved and certified, and must be recorded within twenty (20) days after its execution in the office of the recorder of the county where the buyer, the party feeding, the lessee or the bailee, respectively, resides at the time he executes such contract, lease, feeder or bailment agreement or in case the buyer, the party feeding, the lessee or the bailee is a non-resident of this state, in the office of the recorder of the county or counties where the property involved is located at the time the contract, lease, feeder or bailment agreement is executed by the buyer, lessee, or bailee or feeder, and a contract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated otherwise, it shall be void as to the lien or

interest of the seller, the lessor, bailor or owner against bona fide purchasers, encumbrances and those having no actual knowledge of the contract, lease, feeder or bailment agreement who become creditors of the buyer, the party feeding, the lessee or the bailee, while said property is in the possession of any of the last mentioned parties.” (Emphasis added.

The Referee is not so much to blame because other California statutes, to be referred to, and bearing on the subject, and many of the cases to be cited herein were not called to his attention.

And here I must call attention to a fault which is apparent in many of these reviews, i. e., that counsel, who specialize in bankruptcy, especially those who appear for Trustees seem to rely too much on general “equitable bankruptcy principles” contained in Collier and Remington, and pay too little attention to the fact that contractual rights in bankruptcy are determined by the laws of California and the decisions interpreting them. Some time ago, I had before me a review in which the Referee had determined that the Trustee had certain rights to an automobile because the bankrupt, being indebted to a bank on several obligations, made certain payments which were not applied to the automobile indebtedness. To my surprise, I discovered that, at no time, had the Referee’s attention been called to a section of the Civil Code of California (Section 1479) which permitted the bank to so apply the money.

In another matter, the point upon which the review turned was the effect and manner of service of process on

a dissolved corporation. That, too, depended on California statutes to which the Referee's attention was not called by either side. (California Code of Civil Procedure, 411(6)(a), Civil Code, Sec. 402(a).)

In the case before us, the Referee was induced to disregard binding California law entirely. His memorandum opinion fully demonstrates this. For, while indicating why he disbelieved uncontradicted testimony as to the date of the execution of the instrument,—including (I assume) the stipulated testimony that the notary who took the signature of the officer of the U. S. Machinery Company would testify that the instrument was signed and acknowledged before him on December 12, 1944,—he proceeds to determine that the lease-contract violates Section 2980 of the Civil Code of California without referring to any cases interpreting the section or defining execution and ignoring, as will appear later, even those which were cited to him in the briefs. He bases his decision on his inferences from facts. As to the law, he contents himself with a reference to the rather nebulous “equity powers of the bankruptcy court” (Memorandum Opinion, page 6, line 24). Cases depending on statutory interpretation cannot be determined by general references to bankruptcy powers.

And now to the problem before us.

I advert to the fact that this is another of those cases in which the “security” was not one given to an outsider, but was given for a part of the purchase price. Consequently, the approach to the problem is that laid down by myself in re Mercury Engineering Company, Inc., 1946, D. C. Cal., 68 Fed. Supp. 376, which was re-

cently sanctioned by the Circuit Court of Appeals for the Ninth Circuit in *Citizens National Trust & Savings Bank v. Gardiner*, decided on April 28, 1947, and not yet officially reported.

It may well be that the object of this section, as I stated some years ago, in *re Great Western Petroleum Corp.*, 1936, D. C. Cal., 17 Fed. Supp. 247, 250, is to protect creditors against claims to property in possession of a bankrupt on the basis of which the creditors may have extended credit. But the fact here is, as in the *Mercury Engineering Company* case, *supra*, that the persons who claimed rights under the lease or conditional sales contract were the very persons who furnished the machinery which was paid for. And so we come to the main question.

The Referee took the view that, because one party to this lease contract or the conditional sales contract,—the bankrupt—had signed and executed the instrument, this was “an execution” of the instrument within the meaning of the section. This interpretation disregards entirely the law of California. We do not need to speculate as to what “execution” means because Section 1933 of the Code of Civil Procedure, which has been in effect since 1872, tells us:

“The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.”
(California Code of Civil Procedure, Sec. 1933.)

The Courts of California and the Circuit Court of Appeals for the Ninth Circuit have held that this section means exactly what it says, i. e., it means subscribing not by one party, but by all the parties who are required

to sign it and delivering it to the party for whose benefit it is made, or delivering it for record so as to make it notice to the world. In the case of a lease contract or contract of sale of personal property, delivery means delivery of the instrument, the lease contract, to the lessee after it has been signed by both the lessor and lessee, whether it is to be recorded or not. And when an instrument which, on its face, shows that it was intended to be signed by several parties, is signed by one only of the parties to be bound, and is in the possession of others who are also supposed to sign it, there is no "execution" within the meaning of California law until all the parties have executed it and delivered it to the others or recorded it. (See, *McCarthy Co. v. Commissioner of Internal Revenue*, 1935, 9 Cir., 80 F. (2d) 618 and California cases cited at page 620.) This is also the general rule. (See, 33 C. J. S., Executions, page 120.)

In 17 C. J. S., Contracts, Section 62(a), pages 411-412, it is said:

"It is held in numerous cases that, where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it. The cases so holding are usually those in which the parties executing the instrument would have a remedy by way of indemnity or contribution against the other parties named, which remedy is lost by the failure of such other parties to execute the instrument. The question as to whether those who have signed are bound is generally to be determined by

the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides, or its manifest intent is, that it is not binding until signed." (Emphasis added.)

In *Coen v. American Surety Company of N. Y.*, 1941, 8 Cir., 120 F. (2) 393, 397, it is said:

"Under these authorities the execution of a written contract includes three acts; (1) Signing and (2) unconditional delivery by the promisor and (3) acceptance by the promisee."

In *Barber v. Burrows*, 1876, 51 C. 405, 407, one of the earliest California cases on the subject, it appeared that the instrument called for execution by four persons. Only three executed it. The Court, in a very brief opinion, laid down what has since been the law of California, by saying:

"The instrument of September 2, 1872, was never completely executed. It is evident upon an inspection of the writing itself that it was intended to be signed by all the parties to the contract upon which it was indorsed. These parties were the two principals in the contract and the two sureties upon the

bond attached to and forming a part of the contract. It was signed by but three of these persons.” (Emphasis added.)

This principle was declared later in *Emeric v. Alvarado*, 1884, 64 C. 529, in a very elaborate discussion which continues for several pages (see pages 578 et seq.)—a case which the Referee had before him. This case specifically lays down the rule that where an instrument shows on its face that it cannot become effective unless signed by all parties, it is not executed until it is so signed and delivered. This doctrine finds sanction also in *Williams v. Kidd*, 1915, 170 C. 631, 650, where the Court says:

“Further, it is to be noted that ‘execution’ is a word of well-defined legal meaning, and is here employed with that meaning. ‘Execution’ includes effective delivery.”

In *Sparks v. Mauk*, 1915, 170 C. 122, 123, it is said:

“It is the undoubted rule that where the contract contemplates the execution of it by signing either party has the right to insist upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract. *Tewskbury v. O’Connell*, 21 Cal. 60; *Spinney v. Downing*, 108 Cal. 666 (41 Pac. 797).”

(See also, *Jackson & Thomas v. Torrence*, 1890, 83 C. 523, 538-539; *Hartwell v. Ganahl Lumber Co.*, 1908, 8 C. A. 733; *Winter v. Kitto*, 1929, 100 C. A. 302; *Anthony Macaroni Co. v. Nunziato*, 1935, 5 C. A. (2d)

588.) The latest case on the subject is *Wilk v. Vencill*, 1946, 76 A. C. A. 806, 808, where very pithily Mr. Justice Doran says:

“The property described was owned in joint tenancy; the contract was signed by only one of the owners, hence the execution of the instrument was incomplete. (*Barber v. Burrows*, 51 Cal. 404.) (Emphasis added.)

Of course, when a contract is executed by a party to be charged, there may be circumstances under which, as between him and the party who did not sign, he may be held to it, especially when the other side has performed. But here we are not dealing with such a situation. We are dealing with a requirement which makes an instrument invalid unless it has been recorded within a certain time after “execution”. So that in determining what “execution” means, we must look to the contract to see if it is unilateral or bilateral. A glance at the lease contract shows it to be the type of contract which would have conferred no rights on the bankrupt unless signed by the company which owned the machinery. The first sentence of the contract reads:

“The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:”

The contract contains the usual conditions, reserves title, recites that "the full agreement between parties is contained herein," and provides for signature by an agent of the "U. S. Machinery Co." and for acceptance by the lessee in this form:

"Accepted: Quartz Crystal Products Co.
Raymond I. Biggy
John W. Buol
James F. Collins"

It is not disputed that Biggy, Buol and Collins, composing the Quartz Crystal Products Co., signed and acknowledged the instrument before a Notary on November 14, 1944. But they acquired no rights under it until it was also executed by the U. S. Machinery Company, the owner of the property. The record is undisputed that it was signed by them and acknowledged before a Notary on December 12, 1944, and thereafter sent for recordation in the County where the machinery was located and actually recorded, at the request of the U. S. Machinery Company, on December 18, 1944. The Findings of the Referee to the contrary find no support in the record or in the law. The Referee seems to think that it should have taken only two or three days for the U. S. Machinery Company to have one of its officers execute the instrument and record it. He would, therefore, penalize them and deprive them of the benefit of the Section because of delay. I find nothing in the law of California or in Federal law which would warrant us penalizing the owner of property for delay in executing such an instrument. We are not dealing with a section of the type I had under consideration in re Mercury Engineering Co., *supra*, where I had to determine what is or what is not a "reasonable time." The Code

Section under consideration has saved us the trouble. It has fixed the time,—twenty days “after execution.” As “execution” means signing by both parties and delivery, without which the instrument was not effective, we cannot penalize the party whose property it was by insisting that when one party signed it, they should have signed it within two or three days. For that is not what the law says. The law says simply that it “must” be recorded within twenty days after “execution.” The record shows that it was not fully executed until December 12, 1944, when the owner of the property, without whose signature the contract conferred no rights, executed the instrument. It was recorded six days after such execution. The fact that, in the meantime, the bankrupt may have had possession of the property under this unexecuted contract does not alter the rights of the lessor.

It follows that the Referee interpreted the law incorrectly and that his order dated January 28, 1947, must be and is, hereby, reversed.

Dated this 6th day of June, 1947.

LEON R. YANKWICH

Judge

No. 11705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of Quartz
Crystal Products Co., a limited partnership composed of
Raymond I. Biggy, John W. Buol and James F. Col-
lins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

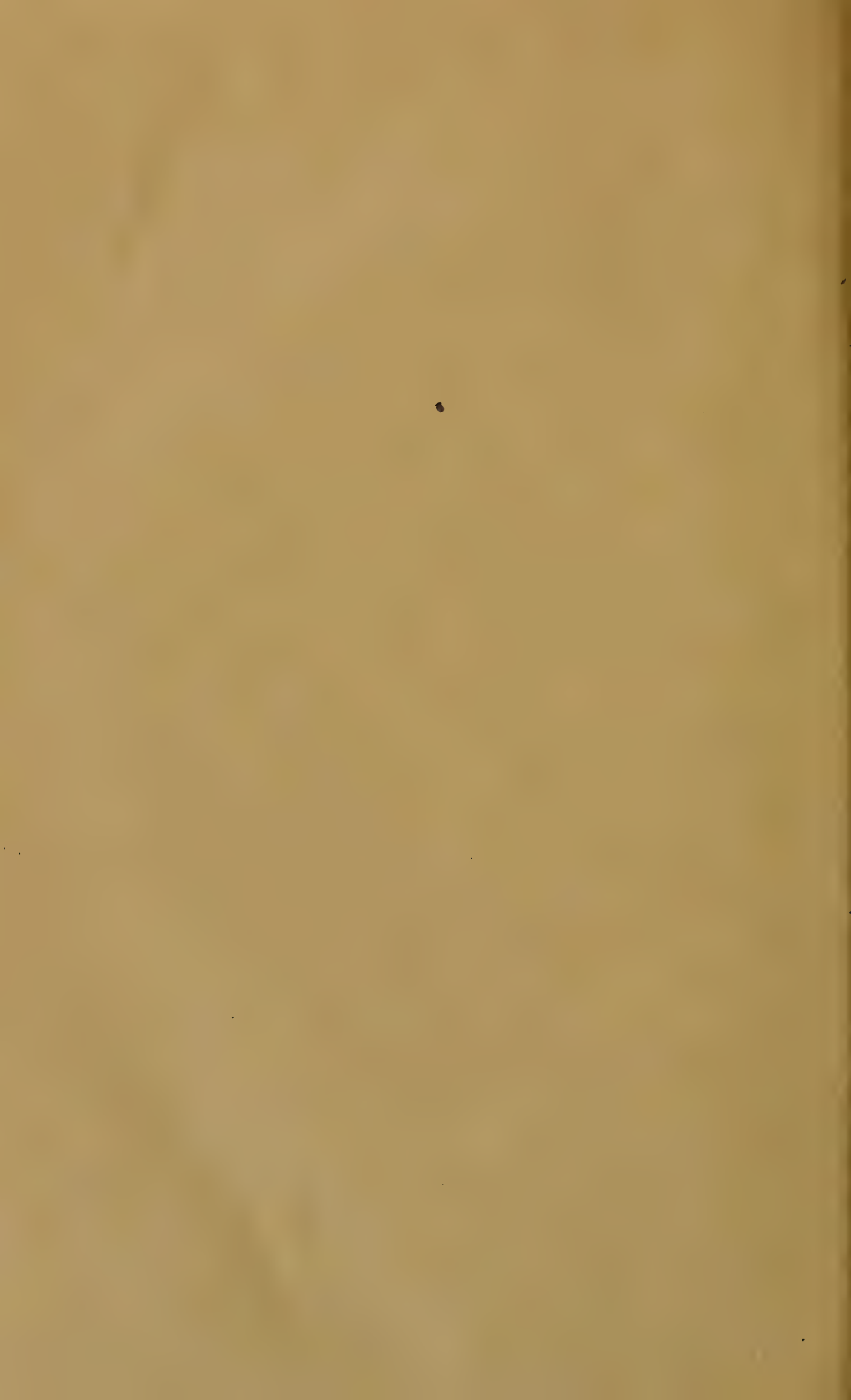
Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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No. 11705
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of Quartz
Crystal Products Co., a limited partnership composed of
Raymond I. Biggy, John W. Buol and James F. Col-
lins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF.

Statement of Issues Involved.

I.

The contracts here involved are conditional sales contracts, notwithstanding that they contain language describing them as leases.

II.

The words "on or about November 10, 1944," used by appellee in Paragraphs III and IV of its Petition of Reclamation herein and used again by appellee in Paragraph IV of its Complaint in Case No. 3172, Calaveras County Superior Court, amount to an admission by appellee that the conditional sales contracts were made and entered into within one or two days of November 10, 1944.

POINT I.

The Contracts Here Involved Are Conditional Sales Contracts, Notwithstanding That They Contain Language Describing Them as Leases.

In Point I of its reply brief, appellee constantly refers to the contracts herein involved as "leases." (*A. B. p. 6.)

Both the Referee and the District Court have expressly held that the agreements are *conditional sales contracts*, notwithstanding that they are styled as leases on their face. Appellant has never contested this determination. Nor is it now in a position to do so. It is clear that, by reason of the reservation of title, and by reason of the provisions concerning the rights of the appellee in the event of default, these agreements *must be conditional sales contracts*.

The holding of the Referee and the District Court in this respect is in accord with the well established law of California.

U. S. Machinery Co. v. International Metals Dev. Inc., 74 A. C. A. 4;

Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37;

Lundy Furniture Co. v. White, 128 Cal. 170;

Silverstin v. Kohler & Chase, 181 Cal. 51;

Hogan v. Anthony, 40 Cal. App. 679;

22 Cal. Jur. 1097;

24 R. C. L. 449.

*"A. B." will be used throughout this brief in place of "Appellee's Brief."

It is therefore respectfully submitted that there is no issue here presented concerning the sufficiency of the execution of a "lease" and that the only question with which we are here concerned is: What are the requirements for "execution," under Section 2980, Civil Code, of a conditional sales contract?

POINT II.

The Words "on or About November 10, 1944," Used by Appellee in Paragraphs III and IV of Its Petition of Reclamation Herein and Used Again by Appellee in Paragraph IV of Its Complaint in Case No. 3172, Calaveras County Superior Court, Amount to an Admission by Appellee That the Conditional Sales Contracts Were Made and Entered Into Within One or Two Days of November 10, 1944.

Appellee, in Point II of its reply brief, contends that the words "on or about November 10, 1944," used in the above-mentioned paragraphs of its Petition and its Complaint, do not limit the time referred to thereby to November 10. [Tr. pp. 14, 15, 80 and 94.]

It is admitted that the conditional sales contracts were not recorded until December 18, 1944. [Tr. p. 70.]

The date twenty days prior to December 18, 1944, was November 28, 1944.

Therefore, appellee is in effect contending that the words "on or about November 10, 1944," used as aforesaid, mean—not November 10, 1944,—but November 28, 1944.

We respectfully submit that such an interpretation is logically preposterous and contrary to the law of this State.

It is interesting to note that appellee has not cited one authority in support of its bizarre contention in Point II of its brief concerning the meaning of the phrase "on or about November 10, 1944." Nor has appellee cited any authorities in support of any of the other points raised in its brief.

In the case of *Boskus v. Waldmann*, 31 Cal. App 245, 258, the Court, in construing an allegation in a complaint to foreclose a mechanic's lien that the building was completed "on or about" a specified date, said:

"But we think that the phrase 'on or about' should be held to mean either the day mentioned or a day in very near proximity thereto. It cannot reasonably be held to mean, in other words, if not the day designated, a day ten, fifteen, or twenty days therefrom. Ordinarily, it is understood to refer to a day or two before or subsequent to the day specifically named."

In *Santa Monica Lumber & Mill Co. v. Hege*, 48 Pac. 69, 71, the Court held that where a contractor filed a statement for mechanic's lien that materials had been furnished on or about *July 1st*, the contractor could not succeed on proof based on delivery on *May 24th*.

In *Hope v. Scranton & Lehigh Coal Co.*, 105 N. Y. S. 372, 120 A. D. 595, it was held that an admission in an answer of service of a claim on or about June 16, 1906, could not be deemed an admission of service made one day prior thereto, to wit, June 15, 1906.

In *Brown & Bigelow v. Bard*, 118 N. Y. S. 371, 374, 64 Misc. 249, a contract for the sale of calendars provided that the calendars should be shipped by freight and delivered f. o. b. cars "on or about" November 1st. On December 8th the seller shipped the goods by express, and the buyer received them six days later. It would take a package from eight to twenty-two days to be carried by freight. The Court held that the seller had failed to deliver on time.

The general rule is set forth in 1 *Corpus Juris Secundum* 347 as follows:

"But in these cases where the time is material, or where precision is intended or necessary, the use of the words [*on or about*] is not approved; and when used in such a sense as to become a part of the contract it denotes an approximation to exactness."

In *North American Ginseng Co. v. Gilbertson*, 206 N. W. 610, 611, 200 Ia. 1349, the Court held:

"The term 'about November 1st' admits of some flexibility, but it must nevertheless be held to mean substantially the date fixed or near approximation thereto. Six weeks after November 1st could hardly be said to have been within the contemplation of the parties. The term admits of no such flexibility when used in a contract to fix a time for the delivery of a commercial product. *Freeman v. Hedrington*, 204 Mass. 238, 90 N. E. 519, 17 Ann. Cas. 741; *O'Brien v. Higley*, 162 Ind. 316, 70 N. E. 242; *White v. McMillan*, 114 N. C. 349, 19 S. E. 234; *Loomis v. Norman Printers' Supply Co.*, 81 Conn. 343, 71 A. 358; *Paine v. Newell*, 66 Mich. 245, 33 N. W. 491."

We respectfully submit that precision was intended and was necessary with respect to the allegations concerning execution of the conditional sales contracts herein involved. The allegations in the Petition and in the Complaint that these conditional sales contracts were made and entered into on or about November 10th must be deemed to mean within a day or two of November 10th—and cannot possibly be deemed to include a date as late as November 28th.

Respectfully submitted,

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By MARVIN WELLINS,

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No. 11706

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON,
HUBERT L. DAWSON, JR., and ARTHUR M.
LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a cor-
poration,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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PAUL H. O'BRYEN,
CLERK

No. 11706

IN THE

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FOR THE NINTH CIRCUIT

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the
Southern District of California

Central Division

No. 6321-O'C Civil

WILLIAM BARISOFF, ROBERT I. KNUDSON,
HUBERT L. DAWSON, JR., and ARTHUR M.
LILLY,

Petitioners,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a cor-
poration,

Respondent.

PETITION FOR ENFORCEMENT OF VETERANS'
REEMPLOYMENT RIGHTS

The petitioners above named respectfully allege:

I.

This petition is filed under the provisions of Section 8(e) of the Selective Training and Service Act of 1940, as amended (50 USCA App. Sec. 308(e)), and Section 7 of the Service Extension Act of 1941, as amended (50 USCA App. Sec. 357); and jurisdiction of the Court is based thereon.

II.

The respondent corporation is engaged in the baseball business, and employs and exhibits a professional baseball team, and operates and maintains a baseball park and office for the conduct of such business at Los Angeles, California, within the jurisdiction of this Court. [2]

III.

During 1942 and 1943, the petitioners left positions as baseball players in the employ of the respondent, in order to enter upon active duty, or to perform training and service under the requirements of the Selective Training and Service Act of 1940, in the United States Army, Navy or Marine Corps. Each promptly entered upon active duty in one of said armed forces, and served therein thereafter until he had satisfactorily completed his period of training and service, and received a certificate thereof, and was honorably discharged from the particular armed force in which he was serving. Within 90 days after being so discharged, each petitioner, during the years 1945 or 1946, applied for reemployment by the respondent, while qualified to perform the duties of his former position in the respondent's employ, and was duly reemployed in his former position by the respondent, as required by law.

IV.

During the year 1946, however, and within one year after the date of his said reemployment, each petitioner was discharged without cause from its employ by the respondent. The respondent has, ever since such discharge, declined and refused to employ each of the petitioners, in his former position, or in any other position, contrary to law. Due to such unlawful discharge, each petitioner has suffered a loss of wages in the amount stated in the paragraph next below, from the date of his said discharge, to this date. And in the case of those of the petitioners who seek restoration to their former positions, they will continue to suffer a loss of wages in future at the rate of their monthly wage, stated in the paragraph

next below, from the beginning of the baseball season on April 15, 1947, until they shall be so restored to respondent's employ. [3]

V.

The statistical facts concerning each petitioner's individual employment, reemployment and discharge by the respondent, the amount of his loss of wages from the date of his discharge to date, and of his service in the armed forces of the United States, are as follows:

	<u>William Barisoff</u>	<u>Robt. I. Knudson</u>
Position Played	Pitcher	Pitcher
Year First Employed by the Respondent	1940	1943
Date of Termination to Enter Armed Forces	Sept., 1942	Sept. 10, 1943
Date of Entering Active Duty in Armed Forces	Nov. 5, 1942	Jan. 11, 1944
Branch of Service Entered	U. S. Navy	U. S. Army
Date of Discharge Therefrom	Dec. 7, 1945	May 5, 1946
Date of Application for Reemployment	Feby. 1946	May 28, 1946
Date of Reemployment	Feby. 1946	June 5, 1946
Monthly Wage on Reemployment	\$300.00	\$250.00
Date of Discharge Without Cause	Feby. 19, 1946	July 29, 1946
Loss of Wages to Date	\$813.00	\$550.00
Future Loss of Wages Per Month
	<u>Hubert L. Dawson, Jr.</u>	<u>Arthur M. Lilly</u>
Position Played	3rd Base	2nd Base
Year First Employed by the Respondent	1943	1942
Date of Termination to Enter Armed Forces	July 1, 1943	July 9, 1943
Date of Entering Active Duty in Armed Forces	July 1, 1943	July 12, 1943
Branch of Service Entered	Marine Corps	U. S. Army
Date of Discharge Therefrom	April 20, 1946	January 9, 1946
Date of Application for Reemployment	April 6, 1946	January, 1946
Date of Reemployment	April 8, 1946	February, 1946
Monthly Wage on Reemployment	\$375.00	\$450.00
Date of Discharge Without Cause	April 22, 1946	May 26, 1946
Loss of Wages to Date	\$763.00	\$1,200.00
Future Loss of Wages Per Month	\$375.00	\$450.00

VI.

A common question of law and fact is involved in the individual complaints of the petitioners in that, as they understand, the respondent claims that they each held seasonal, temporary positions, and that none of the petitioners was entitled to reemployment, as a matter of law, for this reason. Also, they understand the respondent to contend that they did not perform as baseball players to the respondent's satisfaction, whereas the respondent never adequately tested their performance to discover whether, in fact, they were capable of satisfying respondent in the matter of performance.

Wherefore Petitioners Respectfully Pray:

(a) That the Court adjudge and decree that the petitioners, after their service in the armed forces, were entitled to be reemployed as baseball players in the respondent's employ at the times of their applications therefor, and were entitled not to be discharged from their restored positions without cause for one [5] year from the respective dates of their reemployment; and that the respondent's action in discharging each of them was unlawful.

(b) That the respondent be ordered, directed and specifically required: To (1) reemploy and restore petitioners Hubert L. Dawson, Jr. and Arthur M. Lilly to their positions in its employ; and, unless for cause, not to discharge them therefrom during the portion of the reemployment year of each that remained unexpired when they

were discharged; and (2) to compensate each of the petitioners for his loss of wages suffered by reason of his unlawful discharge.

(c) That petitioners recover of respondent the fees and costs of the United States herein, for its benefit.

(d) That petitioners have all such other and further relief as may be just and proper in the premises, and that they have general relief.

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United States Attorney

RONALD WALKER
Assistant U. S. Attorney
Chief of Civil Division

JAMES C. R. McCALL, JR.
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Attorneys for Petitioners [6]

[Verified.]

[Endorsed]: Filed Jan. 23, 1947. [9]

[Title of District Court and Cause]

ANSWER

Comes now the Hollywood Baseball Association, a corporation, Respondent herein, and for Answer to the Petition in the above-entitled action admits, denies and alleges as follows:

I.

Answering paragraph III of the Petition, Respondent denies that each Petitioner, during the years 1945 and/or 1946, or at any other time or at all, applying for re-employment with the Respondent, was qualified to perform the duties of his former position in the Respondent's employ. Respondent denies that the Petitioners were re-employed in their former positions as required by law. [10]

II.

Answering paragraph IV of the Petition, Respondent denies generally and specifically each and every allegation therein contained, except that Respondent admits that it discharged each of the Petitioners during the year 1946. Respondent alleges that each such discharge was for cause. Respondent admits that since such discharge it has declined and refused to re-employ each of the Petitioners. Respondent alleges that it is informed and believes and on such information and belief alleges that the Petitioners and each of them have earned wages and/or salary and/or bonuses during the periods for which they claimed re-employment rights and damages, and which wages and/or salaries and/or bonuses would not have been earned had they been re-employed by Respondent.

III.

Answering paragraph V of the Petition, the Respondent denies that any of the Petitioners were discharged without cause at any time. Respondent admits that the Petitioners were discharged on or about the dates set forth in the statistical facts of paragraph V and alleges that each such discharge was for cause. Respondent does not have sufficient information and belief to answer the allegations with respect to claimed loss of wages to date by each of the petitioners and, basing its denial on this ground denies that the Petitioners, or any of them, suffered loss of wages in the amounts set forth, or in any sum, or at all. Respondent denies that Petitioners, Dawson and/or Lilly, will suffer future loss of wages in the amounts set forth, or in any amount, or at all. Further answering paragraph V and the statistical facts set forth therein, Respondent alleges that the monthly wages, prior to the termination of employment by each of the Petitioners to enter the Armed Forces was:

For Petitioner Barisoff—\$160.00 per month;

For Petitioner Knudson—\$200.00 per month; [11]

For Petitioner Dawson—\$300.00 per month; and

For Petitioner Lilly—\$300.00 per month.

Respondent alleges that the increased figures set forth in paragraph V of the Petition, at which the Petitioners were re-employed, were based upon and contracted for by the Respondent in reliance upon the termination provisions of the respective contracts; that such re-employment wages were based upon the condition that the Petitioners and each of them would perform services worthy of such

amounts; that the Petitioners and each of them failed to perform services worthy of such amounts after re-employment by the Respondent.

IV.

Answering paragraph VI of the Petition, Respondent denies generally and specifically each and every allegation therein contained and the whole thereof.

As a Second, Separate Defense, Respondent Alleges:

I.

That Respondent owns and operates a professional baseball club which is a member of the Pacific Coast League and of the National Association of Professional Baseball Leagues; that for the purpose of providing wholesome and skilled professional baseball to the public the Respondent seeks to engage players who are capable of rendering skilled services and performing the duties required of each of them with expertness, diligence and fidelity; that by reason of Respondent's membership in the Pacific Coast League and the National Association of Professional Baseball Leagues, it is required to abide by the respective rules and regulations of such organizations and to limit the number of players which may be carried on the playing roster of the Respondent's baseball club at one time; that the Respondent from time to time has entered into contract agreements with individual baseball players possessing various degrees of skill and ability and/or professional skill and ability; [12] that all contracts by which Respondent engages baseball players provide that the same may be terminated at any time by the Respondent club or by any assignee.

II.

That it is the universal custom, practice, and usage in professional baseball to hire many more players than a baseball club is able to play; that such practice and custom is followed to encourage and develop new players and to give them assistance in embarking on careers as professional baseball players; that it is well known to the players, the employers and the general public that those who have the skill and ability remain under contract, while those who lack it in one respect or another are released from their contracts.

III.

That the nature of the Respondent's employment contract with each of the Petitioners prior to their respective entries into military service was temporary; that such employment was subject to termination at any time by the Respondent and wholly dependent upon Respondent's judgment of the capabilities and skill of the respective players; that in reliance upon the provisions of the employment contracts, the Respondent hired the Petitioners as temporary players with the hope and expectation that they would develop into skilled baseball players; that the Petitioners and each of them did not develop into skilled baseball players capable of playing on the Respondent's baseball team; that the Petitioners and each of them never developed sufficient skill and ability as baseball players to earn positions on the respondent Baseball Club.

As a Third, Separate Defense, Respondent Alleges:

I.

That Petitioners and each of them were not qualified to perform the duties of the positions, which they had temporarily held before entry into military service, after

return from such [13] service, or at any time thereafter.

As a Fourth, Separate Defense, Respondent Alleges:

I.

That since the entry of Petitioners into military service, the Pacific Coast League has become a Class AAA League; that at the time of the Petitioners' pre-service employment, the Pacific Coast League was a Class AA League; that Respondent is a member of the Pacific Coast League; that an AAA baseball league has higher standards requiring a high degree of skill and ability of the players of its member teams; that the Respondent employer's circumstances have so changed as to make it unreasonable to require the restoration of Petitioners to positions of employment.

As a Fifth, Separate Defense, Respondent Alleges:

I.

That the Petitioners and each of them were discharged by Respondent for cause, to-wit: inability to play baseball with skill and ability.

As a Sixth, Separate Defense, Respondent Alleges:

I.

That the Petitioners and each of them have waited an unreasonable length of time from the alleged unlawful discharge by Respondent in which to commence this action; that the unreasonable length of time in seeking to enforce their demands has prejudiced the Respondent.

VICTOR FORD COLLINS

Attorney for Respondent [14]

[Verified.] [15]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 1, 1947. [16]

[Title of District Court and Cause]

OPINION

Cavanah, District Judge

In the present action four veteran baseball players seek redress for alleged violations by the Hollywood Baseball Association of their statutory re-employment rights as members of the armed forces of the United States. Dawson and Lilly seek an order that they be restored to positions of employment by the respondent.

The respondent asserts that the character of the petitioners' pre-service employment was not such as to entitle them to the privileges and benefits of the Selective Training Act of 1940 as amended, for the reason that the employment of petitioners was temporary in nature, and is based upon the contention that none of them were regular members of the Hollywood Baseball Club. Instead, it is asserted that they were inexperienced and temporary players, who had been signed to contracts terminable at the will of the respondent.

It is also contended by respondent that the petitioners were not qualified to perform the duties of their positions at the time they requested re-employment, and were discharged for lack of skill and ability to play baseball in accordance with the standards of the Hollywood Club, and that the circumstances of the respondent have changed so as to make it unreasonable to require it to re-employ the petitioners, and that they have waited an unreasonable length of time before commencing their action for alleged loss of pay. As to the amount of damages claimed, respondent asserts that the petitioners have not made proper allowance for wages, salaries, and

bonuses gained during the year, which they would not have received had they remained under contract with the respondent, as the figure at which they were employed prior to their military service is the figure to be considered, for they cannot claim damages for the difference between the amounts they actually earned during the period, and the amounts they would have earned had they been retained in the employ of the respondent at the increased figure which the respondent voluntarily paid them upon their re-employment after military service.

The statute relating to the right of re-employment of one who was in the military service of the United States, provides that by Section 308, 50 U. S. C. A., "(b) In case of any such person who, in order to perform such training and service, has left or leaves a position other than a *temporary* position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within 90 days after he is relieved from such training and service * * * after discharged for a period of not more than one year.

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such [18] position or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or *unreasonable* to do so." (Italics supplied.)

Thus, it will be seen that the statute provides when, and under what circumstances, a veteran can be re-employed in his former position and recover for loss of wages and damages. When the petitioners returned from the military service they made application to respondent for re-employment in the Club, and were re-employed—

but thereafter were released for the reasons given by the Club, that they did not meet the skill and ability required by the Club in the class and standard of the Club in the Pacific Coast League, as that League now requires a class and skill and ability of players next to the regular National League. So the inquiry here is: had the circumstances of the employer, the Club, so changed as to have made it impossible or unreasonable for the Club to have re-employed them? The requirements of the Pacific Coast League limit each Club to 25 regular men, and they cannot carry more than that when the season commences. After spring training they are allowed to select 25 men who, in their judgment, can play such a class of ball as to meet opposition. When the regular season opened, or shortly thereafter, when the petitioners assert they should have been re-employed by respondent, those who determined the qualifications of players for the Club determined that, in their judgment, petitioners could not meet the qualifications necessary to compete with opposition, and they released some and others secured employment in other Clubs.

A fair interpretation of the statute is that it does not apply to "temporary positions" or where "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." [19]

Professional ball playing in Clubs in a League seems to stand out as different from ordinary activities, since regular employment of players must be determined upon their skill and ability to meet the qualifications required of the class and standard of ball in the League, and that has to be determined by the Clubs who employ them, as they are taking the chances of meeting opposition—and this is recognized when the players apply for employ-

ment, for in their contracts with the Club they expressly agree that their services are determinable at any time at the will of the Club. It seems that the player has to satisfy the Club, the employer, as to his qualifications to continue. Therefore, the statute would not apply under the evidence in this case when confronted with the exception: "other than a temporary position". It appears that when the petitioners returned and sought re-employment with the respondent, the respondent's situation in the League had changed, and the class and standard of the players had become greater and was recognized as better than when petitioners entered the military service, thereby making it impossible and unreasonable to require the respondent to re-employ them. The evidence is undisputed that a higher and greater class and standard of qualifications for players in the Pacific Coast League had developed while the petitioners were not playing, or under the control of respondent, and the statute authorized the respondent to refuse to re-employ the petitioners at the time in question.

There are cases recognized where skill and ability are the measure and yardstick of re-employment under the Act in question, and of course this case, like all others, is based upon the particular facts in the case. [20]

Thus, the conclusion is reached that, under the Act and the evidence, the respondent was not required to re-employ the petitioners at the times urged for the reasons thus expressed. Finding and decree to be entered in favor of respondent.

Dated this 10th day of March, 1947.

CHARLES C. CAVANAUGH

United States District Judge

[Endorsed]: Filed Mar. 11, 1947. [21]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on regularly for trial on the 6th day of March, 1947, in the above-entitled Court, before the Honorable Charles C. Cavanah, United States District Judge, and before the Court without a jury, Petitioners appearing in person and by their attorneys, James M. Carter, Ronald Walker, and James C. R. McCall, Jr., by James C. R. McCall, Jr., and Respondent appearing by its attorney, Victor Ford Collins by Frank J. Kanne, Jr., and evidence both oral and documentary having been introduced, and the Court having taken the matter under submission, the Court now makes its Conclusions of Law and Findings of Fact as follows: [22]

FINDINGS OF FACT

I.

That it is true that Petition herein was filed under the provisions of Section 8(e) of the Selective Training and Service Act of 1940, as amended, 50 USCA App. Section 308(e) and Section 7 of the Service Extension Act of 1941, as amended, (50 USCA App. Section 357) and jurisdiction of the Court is based thereon.

II.

That it is true that Respondent corporation is engaged in the baseball business and employs and exhibits a professional baseball team and operates and maintains a baseball park and office for the conduct of such business at Los Angeles, California, within the jurisdiction of this Court.

III.

That it is true that during 1942 and 1943, the Petitioners left positions as baseball players in the employ of the Respondent in order to enter upon active duty or to perform training and service under the requirements of the Selective Training and Service Act of 1940 in the United States Army, Navy, or Marine Corps. That it is true that each Petitioner promptly entered upon active duty in one of said armed forces and served therein thereafter until he had satisfactorily completed his period of training and service and received a certificate thereof and was honorably discharged from the particular armed force in which he was serving. That it is true that within ninety days after being so discharged from military service, each Petitioner, during the years 1945 or 1946, applied for re-employment with the Respondent corporation. That it is not true that Petitioners, or any of them, were qualified to perform the duties of their respective former positions in Respondent's employ at the time of such application for re-employment. That it is not true that each Petitioner was re-employed in his former position by the Respondent as required by [23] law. That it is true that each Petitioner was re-employed by Respondent voluntarily.

IV.

That it is not true that during the year 1946, and within one year after the date of each Petitioner's said re-employment, that each Petitioner was discharged with-

out cause from its employ by Respondent. That it is true that each Petitioner was discharged for cause, to-wit, the lack of skill and ability to play baseball according to the standards of the Hollywood Baseball Club. That it is true that Respondent has ever since each such discharge declined and refused to employ each of the Petitioners in his former position, or in any other position. That it is not true that such refusal to re-employ was contrary to law. That it is not true that each Petitioner has suffered a loss of wages in any amount or at all. That it is not true that Petitioners Dawson and Lilly will suffer a loss of wages in the future at the rate of their monthly wage, or at all, from the beginning of the baseball season on April 15, 1947. That it is true that each of the Petitioners has earned wages and/or salaries and/or bonuses which they would not have earned had they been re-employed by the Respondent corporation and the amounts of such other earnings, salaries and bonuses are as follows:

For Petitioner Barisoff	—	\$1,325.00
For Petitioner Dawson	—	\$1,583.50
For Petitioner Knudson	—	\$ 706.61
For Petitioner Lilly	—	\$3,855.00

V.

That it is true that the statistical facts concerning each Petitioner's individual preservice employment, military service, re-employment and discharge are as follows: [24]

	<u>William Barisoff</u>	<u>Robt. I. Knudson</u>
Position Played	Pitcher	Pitcher
Year First Employed by Respondent	1940	1943
Date of Termination to Enter Armed Forces	Sept. 20, 1942	Sept 15, 1943
Date of Entering Active Duty in Armed Forces	Nov. 5, 1942	Jan. 11, 1944
Branch of Service Entered	U. S. Navy	U. S. Army
Date of Discharge Therefrom	Dec. 7, 1945	May 5, 1946
Date of Application for Re-employment	Feb. 1946	May 28, 1946
Monthly Wage at Time of Entry Into Service	\$200.00	\$200.00
Monthly Wage on Re-employment	\$300.00	\$250.00
Date of Re-employment	Feb. 1946	June 16, 1946
Date of Discharge With Cause	April 1, 1946	July 29, 1946

	<u>Hubert L. Dawson, Jr.</u>	<u>Arthur M. Lilly</u>
Position Played	Third Base	Second Base
Year First Employed by Respondent	1943	1942
Date of Termination to Enter Armed Forces	June 15, 1943	August 15, 1943
Date of Entering Active Duty in Armed Forces	July 1, 1943	July 12, 1943
Branch of Service Entered	Marine Corps	U. S. Army
Date of Discharge Therefrom	April 20, 1946	January 9, 1946
Date of Application for Re-employment	April 1, 1946	January, 1946
Monthly Wage at Time of Entry Into Service	\$300.00	\$300.00
Monthly Wage on Re-employment	\$375.00	\$450.00
Date of Re-employment	April 1, 1946	February, 1946
Date of Discharge With Cause	April 15, 1946	May 26, 1946

[25]

That it is not true that the Petitioners have suffered any loss of wages to date or will suffer any future loss of wages. That it is true that each Petitioner was discharged on the date above mentioned for cause. That it

is not true that such discharges were without cause. That it is true that the figure at which each Petitioner was re-employed by the Respondent was a voluntarily negotiated figure, based upon the right and privilege of Respondent to terminate each such re-employment. That it is not true that any such re-employment figures were arrived at under compulsion of law.

VI.

That it is true that a common question of law and fact is involved in the individual Complaints of Petitioners in that they all held temporary positions with the employer prior to their military service.

VII.

That it is true that Respondent owns and operates a professional baseball club which is a member of the Pacific Coast League and of the National Association of Professional Baseball Leagues; that for the purpose of providing wholesome and skilled professional baseball to the public the Respondent seeks to engage players who are capable of rendering skilled services and performing the duties required of each of them with expertness, diligence and fidelity. That it is true that by reason of Respondent's membership in the Pacific Coast League and the National Association of Professional Baseball Leagues, it is required to abide by the respective rules and regulations of such organizations and to limit the number of players which may be carried on the playing roster of the Respondent's baseball club at one time;

that the Respondent from time to time has entered into contract agreements with individual baseball players possessing various degrees of skill and ability and/or professional skill and ability; that it is true that [26] all contracts by which Respondent engages baseball players provide that the same may be terminated at any time by the Respondent club or by any assignee.

VIII.

That it is true that it is the universal custom, practice, and usage in professional baseball to hire many more players than a baseball club is able to play. That it is true that such practice and custom is followed to encourage and develop new players and to give them assistance in embarking on careers as professional baseball players. That it is true that it is well known to the players, the employers and the general public that those who have the skill and ability remain under contract, while those who lack it in one respect or another are released from their contracts.

IX.

That it is true that the nature of the Respondent's employment contract with each of the Petitioners prior to their respective entries into military service was temporary. That it is true that such employment was subject to termination at any time by the Respondent and wholly dependent upon Respondent's judgment of the capabilities and skill of the respective players; that in reliance upon the provisions of the employment contracts,

the Respondent hired the Petitioners as temporary players with the hope and expectation that they would develop into skilled baseball players. That it is true that the Petitioners and each of them did not develop into skilled baseball players capable of playing on the Respondent's baseball team. That it is true that the Petitioners and each of them never developed sufficient skill and ability as baseball players to earn positions on the respondent Baseball Club.

X.

That it is true that Petitioners and each of them were not qualified to perform the duties of the positions, which they had temporarily held before entry into military service, after return [27] from such service, or at any time thereafter.

XI.

That it is true that since the entry of Petitioners into military service, the Pacific Coast League has become a Class AAA League; that it is true that at the time of the Petitioners' preservice employment, the Pacific Coast League was a Class AA League. That it is true that Respondent is a member of the Pacific Coast League. That it is true that an AAA baseball league has higher standards requiring a high degree of skill and ability of the players of its member teams. That it is true that the Respondent employer's circumstances have so changed as to make it unreasonable to require the restoration of Petitioners to positions of employment.

XII.

That it is true that the Petitioners and each of them were discharged by Respondent for cause, to-wit: inability to play baseball with skill and ability.

XIII.

That it is true that the Petitioners and each of them have waited an unreasonable length of time from the alleged unlawful discharge by Respondent in which to commence this action. That it is true that the unreasonable length of time in seeking to enforce their demands has prejudiced the Respondent.

As Conclusions of Law therefor, the Court finds:

CONCLUSIONS OF LAW

That Respondent corporation is entitled to Judgment and Decree that the Petitioners and each of them take nothing by their Petition and that Judgment and Decree be entered in favor of Respondent.

Dated: This 25th day of March, 1947.

CHARLES C. CAVANAH

Judge [28]

Received copy of the within Findings of Fact and Conclusions of Law this 18 day of March, 1947. James M. Carter, U. S. Attorney; by Gertrude M. Johnson, Attorneys for Petitioners.

[Endorsed]: Filed Mar. 25, 1947. [29]

In the District Court of the United States in and for the
Southern District of California
Central Division
No. 6321-O'C Civil

WILLIAM BARISOFF, ROBERT I. KNUDSON,
HUBERT L. DAWSON, JR., and ARTHUR M.
LILLY,

Petitioners,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a cor-
poration,

Respondent.

DECREE

The above-entitled case having come on regularly for trial on the 6th day of March, 1947, in the above-entitled Court, before the Honorable Charles C. Cavanah, United States District Judge, and before the Court without a jury, Petitioners appearing in person and by their attorneys, James M. Carter, Ronald Walker, and James C. R. McCall, Jr., by James C. R. McCall, Jr., and Respondent appearing by its attorney, Victor Ford Collins by Frank J. Kanne, Jr., and evidence both oral and documentary having been introduced, and the Court having taken the matter under submission and having made its written Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that Petitioners take nothing by their Petition and that [30] Judgment and Decree be entered in favor of Respondent corporation.

Dated: This 25th day of March, 1947.

CHARLES C. CAVANAH

Judge

Judgment entered Mar. 25, 1947. Docketed Mar. 25, 1947. Book C. O. B. 42, page 292. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

Received copy of the within decree this 18 day of March, 1947. James M. Carter, U. S. Attorney; by Gertrude M. Johnson, Attorneys for Petitioners.

[Endorsed]: Filed Mar. 25, 1947. [31]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the above named petitioners William Barisoff, Robert I. Knudson, Hubert L. Dawson, Jr. and Arthur M. Lilly, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in this case on March 25, 1947, denying *petitioner* relief, this 23rd day of June, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.

Assistant U. S. Attorney

Attorneys for Petitioners.

[Endorsed]: Filed & mld. copy to Victor Ford Collins
Jun. 23, 1947. [32]

[Title of District Court and Cause]

ORDER EXTENDING TIME ON APPEAL

It appearing to the Court from the affidavit of James C. R. McCall, Jr., that the reporter's transcript of proceedings cannot be completed and filed in this case in time to permit filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Ninth Circuit within 40 days from the notice of appeal, upon application of the petitioners-appellants,

It is Ordered, Adjudged and Decreed that the time for filing the record on appeal and docketing the case in the appellate court be and is extended to and including the 15th day of August, 1947. This July 11, 1947.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Jul. 11, 1947. [33]

[Title of District Court and Cause]

ORDER AS TO ORIGINAL EXHIBITS

It appearing to the Court that the original exhibits in this case should be inspected by the Appellate Court, but that they are primarily contracts between various baseball associations and players on printed forms, and that the copying of the same would be an unnecessary expense, and the said exhibits should be sent to the Appellate Court in lieu of copies,

It Is Ordered, Adjudged and Decreed by the Court that the Clerk of the Court will transmit the original exhibits in this case to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, along with the transcripts of the record on appeal, but without copying such exhibits, and that said exhibits be returned to the Clerk of this Court upon the conclusion [34] of the proceedings in the Appellate Court. This July 31, 1947.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Jul. 31, 1947. [35]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 38 inclusive contain full, true and correct copies of Petition for Enforcement of Veterans' Reemployment Rights; Answer; Opinion, Findings of Fact and Conclusions of Law; Decree; Notice of Appeal; Order Extending Time on Appeal; Order as to Original Exhibits and Designation of Contents of Record on Appeal which, together with copy of Reporter's Transcript of Proceedings on March 6 and 7, 1947 and Original Exhibits Nos. 1 to 16, inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of August, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Charges C. Cavanah, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, March 6, 1947

Appearances:

For the Government: James M. Carter, United States Attorney, Ronald Walker, Assistant United States Attorney; by James C. R. McCall, Jr., Assistant United States Attorney.

For Respondent: Victor Ford Collins, Esq., and Arnold M. Cannon, Esq., 111 West Seventh Street, Los Angeles, California; by Frank J. Kanne, Jr., Esq.

Los Angeles, California; March 6, 1947; 10:00 o'clock a. m.

The Court: Are you ready in the case set forth this morning?

Mr. McCall: Yes, your Honor.

Mr. Kanne: Ready, your Honor.

The Court: Proceed.

Mr. McCall: Mr. Barisoff.

WILLIAM BARISOFF

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: William Barisoff.

The Clerk: Will you take the stand, please?

The Court: What is the name?

(Testimony of William Barisoff)

The Witness: William Barisoff.

The Court: Barisoff.

Mr. McCall: If it please your Honor, I do not presume there is any necessity for reviewing the pleadings, is there?

The Court: Well, you might briefly do so.

Mr. McCall: All right, sir.

(Opening statement by counsel.)

Mr. Kanne: Your Honor, do you wish our statement at this time? [4*]

The Court: You may do so, if you wish.

Mr. Kanne: Thank you.

(Statement of issues by counsel for respondent.)

The Court: All right, proceed.

Direct Examination

By Mr. McCall:

Q. You stated your name: Mr. William Barisoff?

A. Yes, sir.

Q. You are a petitioner in this case?

A. Yes, sir.

Q. Now, Mr. Barisoff, will you state to the court your age? A. Twenty-five.

Q. How long have you been playing professional baseball? A. Four years.

Q. You began, then, when you were 21 years of age?

A. Eighteen.

Q. Eighteen. You mean you have played four seasons, is that right?

A. Four seasons, that's right; three years in the Navy.

(Testimony of William Barisoff)

Q. You began playing seven years ago?

A. Yes, sir.

Q. Where did you first play?

A. Salina, Kansas. [5]

Q. What year was that? A. 1940.

Q. Were you at that time under contract to Hollywood in any way in the year 1940?

A. Yes, under option to Salina, Kansas.

Q. In other words, you had a contract to play with Hollywood for that season? A. Yes.

Q. And you say they optioned you out to Salina?

A. Yes, sir.

Q. Was the option price the same as the price at which you had been contracted to Hollywood?

A. Yes, sir.

Q. What were you drawing? A. \$150.

Q. Did you play the entire season there?

A. Yes, sir.

Q. Where did you play in 1941?

A. San Bernardino and Santa Barbara.

Q. Were you under contract in that year with the Hollywood Baseball Club? A. Yes, sir.

Q. And you were farmed out? Was that the expression used? A. Farmed out, yes. [6]

Q. Farmed out by Hollywood to Santa Barbara?

A. First to San Bernardino and then San Bernardino broke up, and then they put me in Santa Barbara. It was in the same league.

Q. I see. Where did you play the next year?

A. Anniston, Alabama.

(Testimony of William Barisoff)

Q. Anniston, Alabama. Were you under contract with Hollywood for that year? A. Yes, sir.

Q. And were farmed out to Anniston, Alabama?

A. Yes, sir. I stayed there a month, and they recalled me back to Hollywood.

Q. After you were recalled to Hollywood, did you play any games with the Hollywood team?

A. Not many.

Q. In Anniston and these other teams that you have mentioned to which you had been farmed out, were you a regular member of the team on the regular line-up?

A. Yes, sir.

Q. And played in every game or a large number of them? A. A large number of them.

Q. I see. Now, after you had been recalled by Hollywood in 1942, how long did you remain here?

A. About a month and a half.

Q. Then what happened? [7]

A. They sent me to Fort Worth, Texas.

Q. Fort Worth, Texas. Did you play on the regular line-up for that team? A. Yes, sir.

Q. How long did you stay there?

A. About a month.

Q. Where were you playing during the year 1942 when you were here in Hollywood? What position?

A. Well, I was either pitching or playing the outfield.

Q. Were you used in both positions?

A. Yes, sir.

Q. How about the position that you were playing in Fort Worth?

A. Well, I played outfield mostly out there. I just pitched about one game.

(Testimony of William Barisoff)

Q. I see. The teams that you have been playing with: did you play the same way, both as pitcher and outfielder?

A. The same way, outfield and pitching.

Q. All right. Now, when did you enter the Army, I mean the Navy?

A. '42, November.

Q. In November after the close of the season?

A. After the season was over.

Q. At that time were you under contract to Hollywood [8] to play for them the next season?

A. Well, I still belonged to them. They didn't release me.

Q. I see. I hand you a contract between the Hollywood Baseball Association and William Barisoff, dated March 31, 1942.

Will you examine that? Is that the contract under which you played in the season 1942?

A. Yes, sir.

Mr. McCall: I will offer that, your Honor, in evidence as Petitioners' Exhibit 1.

The Clerk: Petitioners' Exhibit 1 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 1.)

By Mr. McCall:

Q. Now, how long did you remain in the Navy?

A. Three years.

Q. Did you play on service teams?

A. Two years, two years out of the three.

Q. Two years out of the three you were in the service?

A. Yes.

(Testimony of William Barisoff)

Q. During the season 1943, the summer of 1943, did you play with the San Diego Training Station team?

A. Yes, sir.

Q. What positions did you play? [9]

A. Pitched and played the outfield.

Q. What about in the season 1944? With what service team did you play?

A. I was stationed down at the Sea Bee Base at Camp Endicott, Rhode Island.

Q. In 1945 did you play baseball? A. No, sir.

Q. What were you doing in the summer of 1945?

A. Went overseas.

Q. Now, when you were released from service—

A. Pearl Harbor Day, December 7, 1945.

Q. —was that—do you have your discharge paper?

A. Yes, sir.

Mr. McCall: Is there any question about his honorable discharge?

Mr. Kanne: That is admitted by the respondent.

Mr. McCall: All right.

Q. By Mr. McCall: After you were discharged from the Navy did you apply to the Hollywood Baseball Club for reemployment? A. Yes, sir.

Q. When did you apply?

A. Well, I think it was in December when I phoned them up, and they wrote a letter and reinstated me.

Q. I hand you a paper which is a contract between the [10] Hollywood Baseball Association and William Barisoff, dated February 18, 1946; and I will ask you if that is the contract that you entered into for the playing of baseball in 1946.

A. Yes, sir.

(Testimony of William Barisoff)

Mr. McCall: I will ask that that be made Exhibit 2.

The Clerk: In evidence?

Mr. McCall: Yes.

The Clerk: Petitioners' Exhibit No. 2 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 2.)

[PLAINTIFFS' EXHIBIT NO. 2]

CONTRACT

Class AAA

Approved by the

NATIONAL ASSOCIATION

of

PROFESSIONAL BASEBALL LEAGUES

UNIFORM PLAYER'S CONTRACT

Important Notices

The attention of both Club and Player is specifically directed to the following excerpt from Rule 3(a), of the Major-Minor League Rules:

"No Club shall make a contract different from the uniform contract and no club shall make a contract containing a non-reserve clause, except permission first be secured from the Executive Committee or the Advisory Council. The making of any agreement between a Club and Player not embodied in the contract shall subject both parties to discipline by the Commissioner or the Executive Committee."

A copy of this contract when executed must be delivered to player either in person or by registered mail, return receipt requested.

(Plaintiff's Exhibit No. 2)

Parties

The Hollywood Baseball Association, herein called the Club and William Barisoff of Los Angeles, California, herein called the Player.

Recital

The Club is a member of the National Association of Professional Baseball Leagues. As such, and jointly with the other members of the National Association of Professional Baseball Leagues, it is a party to the National Association Agreement, and to the Major-Minor League Agreement and Rules with the American League of Professional Baseball Clubs and its constituent clubs and with the National League of Professional Baseball Clubs and its constituent clubs, and is a party to the Constitution and By-Laws of the league of which the club is a member. The purpose of these agreements, rules, Constitutions and By-Laws is to insure to the public wholesome and high-class professional baseball by defining the relations between club and player, between club and club, between league and league and by vesting in a designated Commissioner, Executive Committee and President of the National Association, broad powers of control and discipline and decision in cases of disputes.

Agreement

In view of the facts above recited the parties agree as follows:

Employment

1. The Club hereby employs the Player to render skilled service as a baseball player in connection with all

(Plaintiff's Exhibit No. 2)

games of the Club during the year 1946 including the Club's training season, the Club's exhibition games, the Club's playing season, and any official series in which the Club may participate and in any games or series of games in the receipts of which the Player may be entitled to share; and the Player covenants that he is capable of and will perform with expertness, diligence and fidelity the service stated and such duties as may be required of him in such employment.

Salary

2. For the service aforesaid the Club will pay the Player an aggregate salary of \$300.00 per month, as follows:

In semi-monthly installments after the commencement of the playing season covered by this contract, unless the Player is "abroad" with the Club for the purpose of playing games, in which event the amount then due shall be paid on the first week day after the return "home" of the Club, the terms "home" and "abroad" meaning, respectively, at and away from the city in which the Club has its baseball field.

If a monthly salary is stipulated above, it shall begin with the commencement of the Club's playing season (or such subsequent date as the player's service may commence) and end with the termination of the Club's scheduled playing season, including split-season play-off series, and shall be payable in semi-monthly installments as above provided.

If the player is in the service of the Club for part of the playing season only he shall receive such proportion

(Plaintiff's Exhibit No. 2)

of the salary above mentioned, as the number of days of his actual employment in the Club's playing season bears to the number of days in said season.

Loyalty

3. (a) The Player during said season will faithfully serve the Club or any other Club to which, in conformity with the agreements above, or hereinafter recited, this contract may be assigned, and pledges himself to the American public to conform to high standards of personal conduct, fair play and good sportsmanship.

(b) The Player represents that he does not, directly or indirectly, own stock or have any financial interest in the ownership or earnings of any club, except as herein expressly set forth, and covenants that he will not hereafter, while connected with any club, acquire or hold any such stock or interest except in accordance with the Major-Minor League Rules.

Service

4. (a) The Player agrees that, for the purpose of avoiding injuries and to remain in physical condition to perform the services he has contracted with the club to perform, while under contract or reservation he will not play baseball otherwise than for the Club or for such other Clubs, as may become assignees of this contract in conformity with said agreement; that he will not engage in professional boxing or wrestling; and that, except with the written consent of the Club or its assignee he will not engage in any game or exhibition of football, basketball, hockey, or other athletic sport.

(Plaintiff's Exhibit No. 2)

(b) The Player agrees that while under contract or reservation he will not play in any post-season baseball game except in conformity with the National Association Agreement and Major-Minor League Rules and that he will not play in any such baseball game after October 31st of any year until the following spring training season, or with or against any ineligible player, or team.

Assignment

5. (a) In case of assignment of this contract to another Club the Player shall promptly report to the assignee club; accrued salary shall be payable when he so reports; and each successive assignee shall become liable to the Player for his salary during his term of service with such assignee, and the Club shall not be liable therefor. If the transaction of transfer of services is between two clubs of the same classification in the National Association of Professional Baseball Leagues, the salary rate shall be as first specified in contract. If the assignee is any other club, the salary rate shall be the same as that usually paid by said club to other players of like ability. The foregoing shall apply not only in case of assignment of this contract to another club, but also when the transfer is to a club which the club (party hereto) owns or controls. A subsequent retransfer by such subsidiary to the club (party hereto), either the same season or thereafter, shall not entitle the Player to be paid any salary lost by the Player as a result of such transfer or transfers.

(Plaintiff's Exhibit No. 2)

Termination

(b) This contract may be terminated at any time by the Club or by any assignee by giving official release notice to the player.

Regulations

6. The Player and the Club accept as part of this contract the regulations printed on the third page hereof and also such reasonable modifications of them and such other regulations as the National Association or Club may announce from time to time.

Agreements and Rules

7. (a) The National Association Agreement and the Major-Minor League Agreement and Rules, and the Constitution and By-Laws of the League of which the Club is a member, and all amendments thereto hereafter adopted, are hereby made a part of this contract, and the Club and Player agree to accept, abide by and comply with the same and all decisions of the President of the National Association, the Executive Committee and Commissioner pursuant thereto.

(b) It is further expressly agreed that, in consideration of the rights and interest of the public, the Club, the League President, the President of the National Association, the Executive Committee or the Commissioner may make public the record of any inquiry, investigation or hearing held or conducted, including in such record all evidence or information given, received or obtained in connection therewith, and including further the findings and decisions therein and the reasons therefor.

(Plaintiff's Exhibit No. 2)

Renewal

8. (a) Each year, on or before March 1st (or if Sunday, then the succeeding business day) next following the playing season covered by this contract, by written notice to the Player, the Club or any assignee thereof, may renew this contract for the term of that year except that the salary rate shall be such as the parties may then agree upon.

(b) In default of agreement by the parties, the salary rate shall be determined as provided in paragraph 9, but pending such determination and final decision rendered, the Player will accept the salary rate fixed by the Club or else will not play otherwise than for the Club or for an assignee hereof.

(c) The reservation to the Club, expressly granted and agreed to by the Player, of the valuable and necessary right to renew this contract and to fix the salary rate for the succeeding year, and the promise of the Player not to play during said year otherwise than with the Club or an assignee hereof, have been taken into consideration in determining the aggregate or monthly salary specified herein and the undertaking by the Club to pay said salary is the consideration for the Player's services, the reservation, and renewal option granted and promise made.

Disputes

9. In case of disputes between the Player and the Club or any assignee hereof arising under the provisions of this contract the same shall be referred to the Executive Committee or the Commissioner as the case may be, as an

(Plaintiff's Exhibit No. 2)

umpire, and the Committee's decision shall be accepted by all parties as final, subject only to such right of appeal, as is given to the Player only, under the terms of the National Association Agreement and Major-Minor League Agreement and Rules.

10. The Club and Player covenant that this contract fully sets forth all oral or written understandings and agreements between them, and agree that no other alleged understandings or agreements, whether heretofore or hereafter made, shall be valid, recognizable, or of any effect whatsoever, unless expressly set forth in a new or supplemental written contract executed by the Player and the Club (acting by its president—and that no other Club officer or employee shall have any authority to represent or act for the Club in that respect), complying with all agreements and rules to which this contract is subject, and approved by the President of the National Association.

Special Covenants See "Important Notice" above

11. This contract is subject to Federal or State legislation, regulations, executive or other official orders, or other governmental action, now or hereafter in effect, respecting military, naval, air or other governmental service, which may, directly or indirectly, affect the Player, the Club or the League; and subject also to all rules, regulations, decisions or other action by the National Association, the League, the Commissioner, the President of the National Association, the Major-Minor League Advisory Council, or the League President, including the right of the Commissioner or the President of the National Association to suspend the operation of this contract during any national emergency.

(Plaintiff's Exhibit No. 2)

12. A copy of this contract and constituent part thereof referred to in Section 7(a) hereof, will be furnished the player upon his request made to either the Club or the President of the National Association at the time of executing same or any time during the life of the contract.

13. This contract shall not be valid or effective unless and until approved by the President of the National Association.

Signed this eighteenth day of February, A. D., 1946.

Seal HOLLYWOOD BASEBALL ASSOCIATION

By Victor Ford Collins


President

William Barisoff

Player Sign Here

3136 Farnsworth Ave Los Angeles, Calif

Player's Home Address—Street and City

 Players must sign Correct Name, giving their Initials and Street and Home City Address

Consent of Parent or Guardian

Consent is given to the minor player executing this contract and any renewals thereof as may be necessary under Sections 5 and 8 of the above contract, without any further renewals of this consent.

Parent-Guardian

 Social Security No. 512-14-2014

(Plaintiff's Exhibit No. 2)

Notice: If player is to receive any extra compensation as bonus, salary, or otherwise from the signing Club or from any other source whatsoever, which is not set forth on page one of this contract, it must be inserted below, giving name of payor, amount of payment, when to be paid, etc.

[Stamped]: None

CLUB PRESIDENT'S AFFIDAVIT

State of California

County of Los Angeles

Victor Ford Collins, the undersigned Club President, hereby certifies that all of the compensation player William Barisoff is receiving, or has been promised in the form of salary, transportation (except transportation expenses for one person from the player's home or point of departure to the city to which he is directed to report), allowance, bonus of whatsoever nature, or otherwise from the Hollywood club, or through or from any other club, person, agent, or corporation or to be paid prior to the execution of said contract, during the life thereof or thereafter for services rendered to said club, or incident to such service, is set forth fully in the contract to which this affidavit is attached.

Affiant makes this affidavit with full knowledge that if its contents be found false the club which affiant repre-

(Plaintiff's Exhibit No. 2)

sented may be fined not to exceed Five Hundred (\$500) Dollars and its Club President and/or any person whom he permits to sign this affidavit in the club's behalf suspended from further participation in National Association affairs for a period of two years from the date final decision was rendered finding said affidavit to have been false.

Victor Ford Collins
President

Subscribed and sworn to before me this 19th day of
February, 1946

(Seal)

Elias Nansfield

Notary Public in and for Said County and State.

REGULATIONS

1. The Club's playing season for each year covered by this contract and all renewals hereof shall be as fixed by the League of Professional Baseball Clubs of which the contracting Club is a member.
2. The Player must keep himself in first class physical condition and must at all times confirm his personal conduct to standards of good citizenship and good sportsmanship.
3. The Player, when requested by the Club, must submit to a complete physical examination at the expense of the Club and, if necessary, to treatment by a regular physician or dentist in good standing at the Player's expense. For refusal of the Player to submit to a complete medical or dental examination the

(Plaintiff's Exhibit No. 2)

Club may consider such refusal as a violation of this regulation and may take such action as it deems advisable under regulation 7 of this contract. Disability directly resulting from injuries sustained while rendering service under this contract shall not impair the right of the Player to receive his full salary for a period not exceeding two weeks from the date of his injury, at the termination of which he may be released or continued on the salary roll. Any other misconduct may be ground for suspending or terminating this contract at the discretion of the Club.

4. A Player who sustains an injury while playing baseball for his Club must serve written notice upon his Club of such injury, giving time, place, cause and nature of the injury within ten days of the sustaining of such injury.
5. The Club will furnish the Player with uniform, exclusive of shoes. Upon the termination of the championship playing season or release of the Player the Player agrees to surrender the uniform or uniforms to the Club.
6. The Club will provide and furnish the Player during spring training with proper board and lodging and while "abroad" or traveling with the Club in other cities during spring training or the playing season, with proper board, lodging, and pay all proper and necessary traveling expenses, including Pullman accommodations when necessary and meals en route.

(Plaintiff's Exhibit No. 2)

7. For violation by the Player of any rule or regulation, the Club may impose a reasonable fine and deduct the amount thereof from the Player's salary, or may suspend the Player without salary or both, at the discretion of the Club, but if suspension exceeds ten days the Player may appeal to the President of the National Association.
8. In order to enable the Player to fit himself for his duties under this contract, the Club may require the Player to report for practice at such places as the Club may designate, and to participate in such exhibition contests as may be arranged by the Club for a period of 38 days prior to the playing season without any other compensation than that herein elsewhere provided, the Club, however, to pay the rail traveling expenses, including Pullman accommodations, if available, otherwise only such transportation as may be available will be required, and meals en route of the Player from his home city to the training place of the Club (but not in cases where Club trains at home) whether he be ordered to go to the training camp direct or by way of the home city of the Club. In the event of the failure of the Player to report for practice or to participate in the exhibition games, as provided for, a penalty by way of fine may be imposed by the Club, the same to be deducted from the compensation stipulated herein.

(Plaintiff's Exhibit No. 2)

9. Any Club, member of this Association, assigning a Player's contract to another Club in the National Association during the playing season shall be responsible for the Player's salary, under his contract, up to and including the day notice of such assignment is served upon him, and in addition for the number of days' travel required by the Player, if he promptly reports to the Club to which his contract is assigned. The number of days' travel allowed shall be determined by the number of days which would be required by the use of the transportation furnished by the Club, and the Player's salary with the assignee Club shall begin the day the Player reports to the assignee Club.
10. Any Manager, Player or Umpire, asserting any claim against any person or organization in professional baseball must file an itemized statement of same with the league of which the creditor is a member within 120 days of the maturity of the claim. If league president fails to render decision, or if adverse to either party, the party against whom decision is rendered may appeal to the President of the National Association within 30 days. If assertion of claims be by any league or club against any league or club claims must be filed within 120 days with the President of the National Association. (See Sec. 10-11-12, Article 6, National Association Agreement, for further information.)

(Plaintiff's Exhibit No. 7)

CLASS AAA
NATIONAL ASSOCIATION
PLAYER'S CONTRACT

..... League

of

THE NATIONAL ASSOCIATION
of
PROFESSIONAL BASEBALL LEAGUES

..... Baseball Club

with

..... Player

Approved and Recorded

Feb 24 1946

W. G. Bramham

President of the National Association

June 17th, 1946

..... League President

Case No. 6321 O'C Civil. Wm. Barisoff vs. Hollywood Baseball Assoc. Plf. Exhibit. Date 3/6/47. No. 2 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

No. 11706. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 12, 1947. Paul P. O'Brien, Clerk.

(Testimony of William Barisoff)

By Mr McCall:

Q. Now, this contract provides, does it not, for a monthly salary? A. Yes, sir.

Q. Of how much? A. \$300.

Q. \$300 per month? A. Yes, sir.

Q. After entering into that contract with the Hollywood Club, did you attend the spring training of the club? A. Yes, sir.

Q. Where was the spring training held in 1946?

A. Ontario, California.

Q. How long were you there?

A. About six weeks. [11]

Q. After that time was training continued at Gilmore Stadium in Hollywood?

A. I think they finished the last week up there.

Q. The last week. By the way, your contract did not call for payment for the period that you were in training? A. No, sir.

Q. You got no pay for the spring training?

A. Just expenses is all.

Q. All right. Now, after you came back to Los Angeles were you released by the club?

A. Yes, sir, about three days before the league opened.

Q. Before the playing season started?

A. That's right.

Q. When did the playing season start in 1946?

A. March 29th.

Q. You were released on about what date?

A. About the 26th.

Q. About the 26th. How were you released? What happened at the time you were released?

(Testimony of William Barisoff)

The Court: What year was that? I did not hear you.

Q. By Mr. McCall: What happened? In what manner were you notified that you had been released?

A. Oh, the manager, Buck Fausett, he called me in the clubhouse and just told me I was released. He just said he didn't have any use for me, not any use for me, but that he [12] like me, and all that; he just couldn't see me on the ball club, I mean there was so many men.

Q. He had so many men. Were you permitted to play in any games at Hollywood?

A. I got in a few games.

Q. I mean in the regular playing season.

A. No, sir.

Q. You played at these training games?

A. Yes.

Q. Out in the field? But you were not allowed to play in any regular game?

Q. Yes.

A. No. I was released before the league games started.

Q. I see. Now, under this contract you were required, I believe, to play baseball for the Hollywood Club or for any club to whom they might assign you, is that right?

A. Yes, sir.

Q. Did they offer to assign you to any club at this time, at the time you were released?

A. Well, they said they would try.

Q. They said what?

A. They said they would try.

Q. Mr. Fausett said so?

A. No, I think Mr. Reichow said that. [13]

(Testimony of William Barisoff)

Q. They said they would try to assign you to another club, is that right? A. Yes.

Q. All right. After you were released did you secure employment with another club?

A. Yes, sir, the Bremerton Baseball Club.

Q. Is Bremerton in another league or not?

A. Yes, sir, it is the Western International League.

Q. That is a Class B league, is it? A. Yes, sir.

Q. What club is the Hollywood Club a member of?

A. The AAA.

Q. What league is it? A. Coast League.

Q. Pacific Coast League?

A. Pacific Coast League.

Q. I see. Did you secure this employment through your own application with the Bremerton Club?

A. No. I got in touch with the trainer from Oakland.

Q. I show you a paper which purports to be a copy of a contract between the Bremerton Baseball Club, Inc., and William Barisoff, dated April 24, 1946.

I will ask you whether or not that is a copy of the contract that you entered into with the Bremerton Club.

A. Yes, sir. [14]

Q. Is that the date on which you went to work for them: April 24th?

A. No, I don't think it's April 24th because it starts—the league started April 26th.

Q. 26th?

A. They just made a mistake on this.

(Testimony of William Barisoff)

Q. Let me ask you: did you receive any money from the Hollywood Club under your contract?

A. Yes, sir, \$150 for two weeks when the season started.

Q. Of the playing season? A. Yes, sir.

Q. But you were not called on to play and you did not report? A. That's right.

Q. You had already been told that you were released, is that right? A. That's right.

Q. When was the \$150 actually paid?

A. As soon as I got my release.

Q. On the day that you were released?

A. Yes.

Q. I see. Did you go to Bremerton then and play from April 26th on? A. Yes, sir. [15]

Q. Did you play the full season? A. Yes, sir.

Q. When did the season at Bremerton stop?

A. September 8th.

Mr. McCall: If your Honor please, I would like to introduce in evidence a copy of the contract with the Bremerton Club.

The Clerk: Petitioners' Exhibit 3 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 3.)

Q. By Mr. McCall: That contract was for what amount of money? A. \$175 a month.

Q. For how long did the 1946 season of the Hollywood Club last?

A. I think it was from March 29th to September 22nd.

Q. Of 1946? A. That's right.

(Testimony of William Barisoff)

Q. And these payments you get paid—

A. (Interposing) Every two weeks.

Q. Every two weeks. And you get paid for each day that you play, each day that passes, on the basis of your monthly salary, is that right?

A. That's right.

Q. All right. Now, how many games did you participate [16] in during the season with Bremerton?

A. 131 games.

Q. What position did you play with them?

A. I went there as a pitcher, but they switched me to the outfield and I stayed there as an outfielder.

Q. You played nearly all the season there as an outfielder? A. Yes, sir.

Q. Which particular position? A. Right field.

Q. Right field. How was your fielding? Did you field all right, or not? A. It was all right.

Q. What about your hitting record?

A. Well, I hit .340, 40 home runs and 18 triples and 155 R. B. I.'s.

Q. You mean you drove in 150 runs for Bremerton for the season? A. That's right.

Q. In 131 games? A. That's right.

Q. You say you knocked 40 home runs?

A. Yes, sir.

Q. Did that set a new record in that league?

A. Yes, sir. The old record was 37 home runs. [17]

Q. What about the 18 triples that you got? Did that set a new record for triple base hits?

A. Yes, sir.

(Testimony of William Barisoff)

Q. In that league?

A. It was 17, the old record; and I broke it by one: 18.

Q. You say you were batting .340? A. .340.

Q. Now, what does ".340" mean? Do you know how they arrive at this figure of .340?

A. By the base hits I got.

Q. Well, I mean they take the number of times that you are at bat? A. That's right.

Q. The number of times that you secure at least one base hit? A. That's right.

Q. And get to base by a hit, is that right?

A. Yes, sir.

Q. And by dividing the figure in there, the batting average of .35 is arrived at, is that right?

A. That's right.

Q. In other words, ".340" means that in substance you got a 1-base hit or better for every third time you were at bat, is that right? [18] A. Yes, sir.

Q. All right. Did you receive any bonus for signing the agreement?

A. No, sir, just 10 per cent sale price, that's all. I got that after the season was over.

Q. You mean there was a provision in the contract—let me read the provision. The provision attached to the contract reads as follows:

"If player is to receive any extra compensation as bonus, salary, or otherwise from the signing Club or from any other source whatsoever, which is not set forth on page 1 of this contract, it must be inserted below,

(Testimony of William Barisoff)

giving name of payor, amount of payment, when to be paid, etc. . . . ”

Under which is written:

“10% of Sale Price to be paid to player when sold.”

A. That's right.

Q. That was the provision. Now, after the season with Bremerton was over, were you sold for the 1947 season by Bremerton to any club?

A. Yes, sir the New York Giants.

Q. The New York Giants. And what was the sale price?

A. It was \$12,000, but it was \$4000 down and \$8000 on a 30-day look with Minneapolis. [19]

Q. A 30-day look means that you would go with Minneapolis and play for 30 days, and if they liked you they would pay the other \$8000?

A. That's right.

Q. In other words, \$4000 was paid down with an option to purchase you at \$12,000?

A. That's right.

Q. Have you received any portion of that \$4000 which was paid? A. Yes, sir, \$400.

Q. When did you receive that?

A. I think it was about December.

Q. Of 1946? A. Yes.

Q. Are you planning to go to Minneapolis for the playing season? A. Yes, sir.

Q. When does spring training start there?

A. March 9th.

Q. Of 1947? A. That's right.

Mr. McCall: I think that is all.

(Testimony of William Barisoff)

Cross Examination

By Mr. Kanne:

Q. On your direct examination you testified to having [20] played for the Salina team in 1940?

A. Yes, sir.

Q. What league classification was that team a member of? A. "C."

Q. That is the Kansas team?

A. Salina, Kansas.

Q. And the San Bernardino team in 1941?

A. Yes, sir.

Q. What league was that?

A. That was the California state league "C" ball.

Q. And the Santa Barbara team?

A. Yes, sir. The San Bernardino broke up; so the Hollywood put me with the Santa Barbara.

Q. Did you play for Santa Barbara?

A. Yes, sir.

Q. What league is it in?

A. The same league.

Q. The "C" league? A. Yes.

Q. In 1942 at Anniston, Alabama, what league is that club in? A. Class "B."

Q. What league is it?

A. The Southeastern league. [21]

Q. You testified that you received \$175 per month from Bremerton starting on April 26, 1946.

You don't have the figures of how much the total salary that you received from the Bremerton Club in 1946 was? A. You mean the tax?

Q. Pardon? A. The tax?

(Testimony of William Barisoff)

Q. No, no, what your stipulated rate of pay was and what you received and add to that any withholding amounts, not just your take-home pay, but the total of the agreed amount that you were to receive.

A. Yes, I got that. I got it.

Q. What was that figure?

A. They put the \$400 in.

Q. Pardon?

A. I don't know. I got it at home.

Q. You stayed with the Bremerton team, though, from April 26 of 1946 to the end of the season, is that correct?

A. Yes, sir.

Q. What date did you say the season ended? On September 8th, is that correct?

A. September 8th.

Q. You did receive pay at the rate of \$175 per month for that period of time?

A. Yes, sir. [22]

Mr. Kanne: That is all.

Redirect Examination

By Mr. McCall:

Q. What is the classification of the league, the Pacific Coast League?

A. AAA.

Q. Now, at the first time you started playing with them what was the classification of that Pacific Coast League?

A. AA.

Q. AA?

A. AA.

Q. Now, what class of league is the Minneapolis team?

A. It is an AAA, the same as the Pacific Coast League.

Q. Minneapolis?

A. Yes.

Mr. McCall: All right, that is all.

The Court: When you went over to the New York Giants, how long did you remain there?

The Witness: They just bought me this last year. I haven't been over there yet.

The Court: You have not been over there yet?

The Witness: No, sir.

The Court: Are you expecting to go there?

The Witness: No, sir. The New York Giants farmed me out to Minneapolis. [23]

The Court: I see.

Mr. McCall: That is all.

The Court: That is all.

(Witness excused.)

The Court: We will recess for 5 minutes.

(Brief recess.)

Mr. McCall: If your Honor please, I want to put Mr. Barisoff on for one more question.

WILLIAM BARISOFF

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Further Redirect Examination

By Mr. McCall:

Q. Mr. Barisoff, when did you first make a complaint to the Selective Service System about your discharge by the Hollywood Club?

A. About a month before the season closed in our league over there down in Seattle.

Q. In Seattle. So that the season closed September the 8th and you complained—

A. (Interposing) In August.

(Testimony of William Barisoff)

Q. In August. You turned the matter over to them to adjust for you? A. Yes, sir.

Q. To try to work out? [24] A. Yes, sir.

The Court: What year was that?

Q. By Mr. McCall: I say, did you turn the matter over to them to try to work out for you?

A. Yes, sir.

The Court: That was in 1946?

The Witness: Yes, sir.

Q. By Mr. McCall: And thereafter did you communicate with the Selective Service System from time to time about their contact with the baseball club?

A. Yes, sir. As soon as the league closed I phoned Seattle up and told them I was coming back home to Los Angeles; so they transferred it over to here to Ninth and Hill, I think.

Q. You have been in contact from then on with the Selective Service System or the United States Attorney's office about this matter? A. Yes, sir.

Q. At the time that you contacted the Selective Service System about this had you at that time been purchased by the Giants, the New York Giants?

A. No, sir. It was after the baseball season when they bought me.

Q. That was sometime in December, I believe you said, November or December? [25]

A. Well, no. They bought me about two weeks after the season was over.

Mr. McCall: That is all.

Mr. Kanne: No further questions.

(Witness excused.)

Mr. McCall: Mr. Lilly.

ARTHUR M. LILLY,

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Arthur M. Lilly.

The Court: I did not catch your name.

The Witness: Arthur M. Lilly.

The Court: How do you spell it?

The Witness: L-i-l-l-y.

Direct Examination

By Mr. McCall:

Q. Mr. Lilly, what is your age, please?

A. Twenty-nine, sir.

Q. How long have you been playing professional baseball?

A. This is my eighth year.

Q. In other words, you started eight years ago?

A. Yes, sir. [26]

Q. With whom did you first play professional baseball?

A. I left college in '39 and went down to Beaumont, Texas, in the Texas League.

Q. How long did you stay with Beaumont?

A. I stayed there until 1940.

Q. In other words, you played two seasons with Beaumont?

A. Yes, sir.

Q. What class league was that?

A. A-1.

Q. Is that the same class league as the Pacific Coast League then was?

A. No, sir. The Pacific Coast then was AA.

Q. AA?

A. Yes, sir.

(Testimony of Arthur M. Lilly)

Q. After you played the years 1939-1940 with Beaumont, what position did you play? A. Second base.

Q. In 1941 did you play professional baseball?

A. Yes, sir. I played with Texarkana in the Cotton States.

Q. Is that Texarkana, Texas, or Texarkana, Arkansas? A. That is in between Texas and Arkansas.

Q. What positions did you play?

A. I played third, short and second. [27]

Q. In 1942 with whom did you play?

A. Well, after the '41 season the league broke up. The Cotton States was made a free agent, and I signed up with Hollywood in the spring.

Q. You signed with them the beginning of the season? A. '42.

Q. What position did you play with Hollywood during the 1942 season?

A. In the 1942 season I was playing during spring training—I played short some and second base, and then they optioned me out to Tacoma after the league started, the Coast League started.

Q. What class league is the Tacoma?

A. Class "B", Western International League.

Q. Did you spend the entire season with Tacoma?

A. Yes, sir.

Q. Under contract with Hollywood?

A. Yes, sir. I was on option.

Q. Now, in 1943 with whom did you play?

A. Hollywood.

Q. Did you sign a contract that year?

A. Yes, sir.

Q. What was your pay? A. \$300 a month.

(Testimony of Arthur M. Lilly)

Q. Did you play the entire season? [28]

A. I played until July when I was inducted in the service.

Q. Were you on the regular first string?

A. Yes, sir.

Q. When were you inducted into the service?

A. July 9, 1943.

Q. What branch of the service? A. Air corps.

Q. Now, did you play baseball while in the service?

A. Yes, sir.

Q. In other words, you kept in shape?

A. Yes, sir.

Q. With whom did you play in 1943?

A. I played with the Sixth Ferrying Group in 1943, and in 1944 at Long Beach, California.

Q. In 1945 did you play?

A. In 1945 a group of ball players went overseas as an entertainment unit, and I went overseas with them.

Q. What type players were on this team?

A. The majority of them were major league ball players.

Q. Major League ball players? You mean something that is even higher, as AAA?

A. That is as high as you can go, sir.

Q. In other words, there are 16 major league teams?

A. No. There is 8 major league ball clubs. [29]

Q. Eight major league ball clubs? A. Yes, sir.

Q. In other words, there is one—

A. (Interposing) National, American—16 is right.

Q. They are the only teams that are entitled to be called a major league team, is that right?

A. Yes, sir.

(Testimony of Arthur M. Lilly)

Q. Right under that is the AAA, is that right?

A. Yes, sir.

Q. All right. After making this trip with this group, which you say was composed of major league ball players in the service, were you discharged in '45?

A. I was discharged in '46.

Q. '46? A. January 9, 1946.

Q. Now, did you apply to the Hollywood Baseball Club for reemployment?

A. Yes, sir. I phoned Mr. Reichow and asked him what I had to do.

Q. Who is Mr. Reichow?

A. Mr. Reichow is the business manager of the Hollywood Baseball Club. I asked him—

Q. (Interposing) Mr. Fausett was the manager?

A. He was the manager, yes, sir.

Q. Mr. Fausett directed the play on the field and Mr. [30] Reichow looked after the money, is that right?

A. Yes. He is the business manager.

Q. All right. You contacted Mr. Reichow and what happened?

A. He told me to wire or write Bramham, Mr. Bramham—George Bramham. He is a minor league judge. And I wrote him, and I got a reply that I was reinstated to the Hollywood Baseball Club.

Q. Now, in connection with that I will ask you whether or not these players when they went into the service were put on military leave under the orders of the National Association of Professional Baseball Leagues of which Judge Bramham was the minor league czar.

A. Yes, sir.

(Testimony of Arthur M. Lilly)

Q. Ruler? A. Yes, sir.

Q. So you cleared and secured your reinstatement from Judge Bramham to the Hollywood Club, is that right? A. Yes, sir.

Q. I hand you a letter dated January 18, 1946, addressed to Arthur M. Lilly at Inglewood, California, signed by W. G. Bramham, President-Treasurer of the National Association of Professional Baseball Leagues, Office of the President, Durham, North Carolina.

Is that the letter that you received from Judge Bramham [31] notifying you of your reinstatement?

A. Yes, sir.

Mr. McCall: It reads as follows:

“Dear Sir:

“I have your letter stating that you have been discharged from the service. I am reinstating you to the active list of the Hollywood Club.

“Very truly yours,

“W. G. Bramham

“President-Treasurer.”

Q. By Mr. McCall: Is that right?

A. Yes, sir.

Mr. McCall: I ask that that letter, if your Honor please, be made Petitioners' exhibit next in order.

The Clerk: Petitioners' Exhibit 4 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 4.)

[PLAINTIFFS' EXHIBIT NO. 4]

NATIONAL ASSOCIATION OF PROFESSIONAL
BASEBALL LEAGUESOffice of the President
Durham, N. C.

January 18th, 1946.

Arthur M. Lilly
609 Venice Way, Inglewood, Calif.

Dear Sir:

I have your letter stating you have been discharged from the service. I am reinstating you to the active list of the Hollywood Club.

Very truly yours,

W G Bramham

W. G. Bramham,

WGBd

President-Treasurer

Hollywood

Case No. 6321 O'C Civil Wm. Barisoff vs. Hollywood Baseball Assoc. Plf. Exhibit. Date 3/6/47. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

No. 11706. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 12, 1947. Paul P. O'Brien, Clerk.

(Testimony of Arthur M. Lilly)

Q. By Mr. McCall: Now, as a result of that reinstatement I will ask you whether or not a contract was entered into for the 1946 season between the Hollywood Club and yourself. A. Yes, sir.

Q. I hand you two papers. First I hand you a paper which purports to be a contract between the Hollywood Baseball Club and yourself dated April 15, 1943, and ask you if that is a correct copy of the contract under which you played baseball for Hollywood in the season 1943.

A. Yes, sir.

Mr. McCall: I will ask that that be admitted in evidence as Petitioners' Exhibit No. 5.

The Court: It may be admitted.

The Clerk: Petitioners' Exhibit No. 5 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 5.)

Q. By Mr. McCall: Now, the salary in that contract for 1943 was \$300, was it not?

A. \$300 a month, yes, sir.

Q. I hand you another paper which is a contract between Hollywood Baseball Association and yourself, dated February 18, 1946, and ask you if that is the contract under which you played baseball for Hollywood in 1946.

A. Yes, sir.

Q. The salary there is \$450 a month.

A. Yes, sir.

Q. This was on a uniform player's contract, is that right? A. Yes, sir.

Mr. McCall: I will ask that that be admitted, your Honor, as Petitioners' Exhibit No. 6.

The Court: It may be admitted. [33]

(Testimony of Arthur M. Lilly)

The Clerk: Petitioners' Exhibit 6 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 6.)

Q. By Mr. McCall: Now, were you restored to the regular line-up of the Hollywood Club in 1946?

A. No, sir.

Q. Did you go to spring training with them?

A. Yes, sir.

Q. Any complaint ever made about the way you were playing baseball?

A. Not that I know of, unless it was made some other place.

Q. It wasn't made to you? A. No, sir.

Q. How long did you remain with the team?

A. I remained until May 26, 1946, when I was released.

Q. May 26th? A. Yes, sir.

Q. The season opened—

A. (Interposing) April 1st.

Q. April 1st. So that you were with them practically two months? A. Yes, sir.

Q. Now, under what circumstances were you released by the Hollywood Club? [34]

A. Well, I went in one Sunday before the game, before I got dressed, and I went in and asked Mr. Reichow what was going to happen, whether they were going to send me out before the season started. He took me up in the stands one day and talked to me and wanted to send me to Birmingham.

(Testimony of Arthur M. Lilly)

Q. Let us get about what date that was again.

A. That was in—I am not positive—but it was in April, the first part of April.

Q. The first part of April? A. Yes, sir.

Q. Right immediately after the play started for the year? A. Yes, sir.

Q. And Mr. Reichow was talking to you. Now, what did he say to you?

A. He said would I like to go to Birmingham. Well, I wasn't too tickled about the idea at the time because I figured—I figured I wouldn't have chance enough to make the ball club.

Q. What did you say?

A. I said that I didn't have an ample chance to make the ball club.

Q. You were not convinced that you didn't have any?

A. Yes, sir.

Q. All right. [35]

A. And finally I told him that I would have to 'tend to some business; I wanted to sell my car and stuff before I went up there, and I think the season started around April 13th or April 12th, around there; and I was supposed to leave right away if I went. So nothing was said. I went home and tried to sell my car, and everything like that; and after I came back again, after the first series we played, I was called in to see him and he said that they were going to keep me on the ball club; so they weren't going to send me out. So it was all right with me.

Q. He was referring to Birmingham, Alabama, in the Southern League?

A. In the Southern League, yes, sir.

(Testimony of Arthur M. Lilly)

Q. All right. Did you participate in a series of games at San Diego? A. Yes, sir.

Q. What position did you play down there?

A. Second base.

Q. Was the team successful? A. Yes, sir.

Q. Did you play a good game of baseball or not?

A. Fair.

Q. All right. Now, what occurred then from that time on until you were released?

A. Well, from that time on I was just in and out, once [36] in a while pinch-hit, and went in and relieved a couple of times in Portland. Then we went up north, and Woody Williams got hurt. His ankle was broken; so I was put in second base at the time.

Q. I see.

A. Then we came down south, and I played several games against Oakland, and Seattle came to town.

Q. Who was that? A. Seattle.

Q. Seattle came to Hollywood? A. Yes, sir.

Q. All right.

A. And then we went up north again to Oakland, and I didn't play any more after that. That is all.

Q. Did they bring in a new player while you were at Oakland?

A. Yes, sir. He was supposed to sign on, but he didn't report until we went up to Oakland.

Q. I see. And he played—

A. (Interposing) Yes, sir. He played second base.

Q. Now, were you playing any differently, any worse, in 1946 than you were in 1943?

A. No. I thought I was playing better.

(Testimony of Arthur M. Lilly)

Q. I see. On the occasion, now, when this new man reported at Oakland, about how long was it then until you had [37] the conversation with Mr. Reichow in which you were released?

A. Oh, that has been approximately a month, a little over a month, a month and a half, a month and a week, something like that.

Q. Had you been playing regularly?

A. I had been in and out.

Q. Sort of a utility man? A. Yes, sir.

Q. All right. Then you had a conversation with Mr. Reichow? A. Yes, sir.

Q. You went to see him about the matter?

A. Well, one Sunday we came home, and Sunday I thought I would go in and find out what was going to happen, whether they were going to option me out or what they were going to do. So I went in and talked to him and had a little talk, and he finally told me he was going to give me my release. But I wasn't too satisfied about it, but I didn't say too much.

Q. Is this the release he gave you (indicating)?

A. Yes, sir.

Q. This paper dated May 26, 1946, signed "Oscar Reichow, Hollywood Baseball Club," addressed to you:

"You are hereby officially notified of the following disposition of your contract: [38]

"1. You are released outright and unconditionally."

Is that the notice he gave you? A. Yes, sir.

Q. That you received? A. Yes.

(Testimony of Arthur M. Lilly)

Mr. McCall: I will ask that that be made Petitioners' Exhibit No. 7.

The Clerk: Petitioners' Exhibit No. 7 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 7.)

[PLAINTIFFS' EXHIBIT NO. 7]

CLASS AAA

THE NATIONAL ASSOCIATION OF
PROFESSIONAL BASEBALL LEAGUES

Official Notice of Disposition of Player's Contract
and Services

To Player Arthur M. Lilly. You are hereby officially notified of the following disposition of your contract:
Cross Out Conditions Not Applicable

1. You are released outright and unconditionally.

* * * * *

Secretary

Oscar Reichow ~~President~~

Hollywood Baseball Club

Dated May 26, 1946.

Mail one notice each to (1) President National Association; (2) President of League; (3) Hand one to player, or, if not possible, mail to him by registered mail at time of assignment return or cancellation of right of recall of his contract or his outright release therefrom.

(Over)

(Plaintiffs' Exhibit No. 7)

.....19.....

Receipt of copy of this official notice is acknowledged.

.....

Player

Witness:

.....

Note:—Receipt not required but is suggested only as added protection to club in case of personal delivery—not when mailed player which should be by registered mail. In the latter case mail original to player, copies to League President and President of National Association on date of issuance.

Case No. 6321 O'C. Barisoff vs. Hollywood Baseball. Plf. Exhibit. Date 3/6/47. No. 7 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif., Deputy Clerk.

No. 11706. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 12, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. McCall: By the way, I meant to ask you, you were honorably discharged from the Army?

A. Yes, sir, from the Army.

Q. After your release on May 26th did you secure employment as a baseball player elsewhere?

A. Yes, sir.

(Testimony of Arthur M. Lilly)

Q. When was it?

A. I signed a contract June 7, 1946, with the Yakima Ball Club.

Q. What rate of pay were you to receive there?

A. \$200 per month.

Q. And your contract with Hollywood under which you had opened the season was \$450, was it not?

A. \$450, yes sir. [39]

Q. I hand you a contract between the Yakima Baseball Club, Inc., and yourself, dated June 7, 1946, and ask you if that is the contract under which you played baseball for Yakima.

A. Yes, sir.

Q. That is the date on which you entered into it?

A. Yes, sir.

Mr. McCall: I ask, if your Honor please, that it be made next exhibit in order.

The Clerk: Petitioners' Exhibit No. 8 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 8.)

Q. By Mr. McCall: Now, did you finish the season with Yakima?

A. Yes, sir.

Q. Have they offered you a contract to play for 1947?

A. Yes, sir.

Q. At what figure?

A. \$240 a month.

Q. How much?

A. \$240 a month.

Q. Did you receive any bonus for signing the contract?

A. Yes, sir.

Q. That has been made Exhibit 8?

A. Yes, sir. [40]

(Testimony of Arthur M. Lilly)

Q. How much?

A. \$500. \$350 was to be paid the first installment, \$150 by September 1st.

Q. That contract requires you to play for them during the 1947 season, too?

A. Well, I am under contract to them, yes, sir.

Q. And any dispute about the amount you were to get, then, that is to be referred, under the baseball regulations, to an umpire?

A. That is between you and the club owner.

Q. I mean if you cannot agree.

A. Yes, sir. That is between the player and the club owners if you can't agree on a salary.

Q. All right. I believe you requested in this petition that Hollywood reinstate you to its employ for the balance of your employment year?

A. That is the way I applied for it, yes, sir.

Q. When did you first complain or contact the Selective Service System about your discharge by Hollywood Baseball Club?

A. June of 1946.

Q. Let's see. You were discharged on May 26th?

A. Yes, sir.

Q. What particular branch of the Selective Service System did you contact? [41]

A. I contacted the draft board, sir, in Yakima.

Q. In Yakima?

A. Yes, sir.

Q. Did you contact them from time to time after you were negotiating with the Hollywood Club?

A. Yes. I contacted them from time to time. They switched my case from Washington to California.

Q. And they referred it to the United States Attorney's office, is that right?

A. Yes, sir.

(Testimony of Arthur M. Lilly)

Q. Now, when did the season end for the Yakima Club? A. September 8, 1946.

Q. The Hollywood Club continued to play until September 22nd, is that right?

A. Around that period of time. I don't know just exactly the dates.

Q. Under this contract you get paid for each day during which the club continues to play baseball, is that right? A. Yes, sir.

Q. And you would have continued to play for Hollywood, if you had been under that contract, from September 8th to about September 22nd? A. Yes, sir.

Mr. McCall: That is all. [42]

Cross Examination

By Mr. Kanne:

Q. During the year 1946 you testified that you were with the Hollywood Ball Club in spring training up to May 26th, is that correct?

A. May 26th is during the season.

Q. You were with them from the commencement of the season up to May 26th? A. Yes, sir.

Q. And at what rate of pay were you paid?

A. \$450 a month.

Q. What was the total that you received from the Hollywood Ball Club for the period you were with them?

A. Closely around \$880-some dollars.

Q. \$880? A. Yes, sir.

Q. Was that your take-home pay or your salary pay for the time? A. That was without—

Q. That was without deductions? A. Let's see.

(Testimony of Arthur M. Lilly)

The Court: Do you want a little time to check that up? I will give it to you.

The Witness: No, that's all right. Approximately \$885.

Q. By Mr. Kanne: Were you given pay beyond May 26th [43] when you were given your notice of release? A. No, sir.

Q. You were not given any termination pay?

A. No, sir, just up to May 26th.

Q. You testified that you received a \$500 bonus from the Yakima Club? A. Yes, sir.

Q. When did you receive the \$350?

A. I received \$350 about, oh, about a week after I signed my contract.

Q. Was that in June of 1946? A. Yes, sir.

Q. Did you receive the \$150 on September 1st of 1946? A. I received that around August.

Q. Did you receive any other bonuses from the Yakima Ball Club for any purpose whatsoever?

A. The only thing we received, we had an exhibition game after the season; and we got \$60 out of it.

Q. You got \$60 for an exhibition game?

A. Yes, sir.

Q. Do you know how much you received altogether from the Yakima Club in salary, including the exhibition game and the monthly salary that you received from the time which you signed on on June 7th until the end of the season? A. Yes, sir. [44]

(Testimony of Arthur M. Lilly)

Q. And excluding the amounts that you have testified to as bonus?

A. I received \$200 a month for three months: \$600. That is without tax, without the tax taken out, and plus my bonus, \$500 bonus.

Q. Plus what? A. My bonus.

Q. And plus the \$60? A. That is \$1100.

Q. \$1160. A. \$1160, that's right.

Q. After completing the season with Yakima have you played baseball anywhere else up to the present time?

A. Yes, sir.

Q. Where have you played?

A. I played this winter down in Mexico for Hermoillo.

Q. Is that any organized league?

A. No, sir. They called it the League Pacific. It is more or less semi-pro down there.

Q. What rate were you paid at down there?

A. \$450 a month.

Q. You were paid at the rate of \$450 a month?

A. Yes, sir, and—

Q. (Interposing) When did you start to play there?

A. The 16th of October. [45]

Q. When did your employment terminate?

A. The 18th of February.

Q. Did you receive the \$450 a month for all the intervening months?

A. Just for the months I was down there.

Q. For four months? A. Four months.

(Testimony of Arthur M. Lilly)

Q. You received approximately \$1800?

A. Yes, sir.

Q. Was \$1800 the precise figure?

A. \$1800 is precisely what it was, yes.

Q. Have you received any other compensation from any other organization for playing baseball since the commencement of the 1946 season and up to date?

A. No, sir. That is all.

Q. You testified that during the time that you were in spring training prior to the 1946 season no complaint was made about your play.

Did your play come to the particular attention of either the manager, Mr. Fausett, or the coach, Mr. Thurston, for particular instruction at any time?

A. Yes, sir. Mr. Thurston tried to cure a certain bat—certain batting habits that I had. That is about all the instruction that I remember getting.

Q. Did he work with you on that on different occasions? [46]

A. Yes, sir.

Q. Did he continue to work and coach you during the period after the commencement of the season and as long as you were with the Hollywood Club?

A. Yes, sir.

Mr. Kanne: No further questions.

Mr. McCall: That is all.

The Court: That is all.

(Witness excused.)

Mr. McCall: Mr. Knudson.

ROBERT I. KNUDSON,

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert I. Knudson.

The Court: I did not catch the last name. What is your name?

The Witness: Robert I. Knudson.

The Court: How do you spell it?

The Witness: K-n-u-d-s-o-n.

Direct Examination

By Mr. McCall:

Q. Mr. Knudson, what is your age?

A. Twenty-one. [47]

Q. When did you first play professional baseball?

A. 1943.

Q. Speak out loud so I can hear you and the judge can, too.

A. 1943.

Q. Did you sign up with Hollywood?

A. Yes, sir.

Q. At that you played baseball?

A. Yes, sir.

Q. How long were you with the club?

A. From the middle of June for the remainder of the season.

Q. You finished the season with them?

A. Yes.

Q. How much were you being paid?

A. \$200 a month.

Q. Now, let's see. You had been playing baseball that year on a high school team, had you?

A. Yes, sir, previously.

(Testimony of Robert I. Knudson)

Q. Previous to that. At the close of school you went with the Hollywood Club?

A. Yes, sir, that's right.

Q. How many games did you play in?

A. At Hollywood?

Q. Yes. [48]

A. I took part in approximately six or seven.

Q. As a pitcher? A. Yes, sir.

Q. Now, after the close of the season did you enter the Army?

A. Well, within four or five months after the season, yes.

Q. When did you enter the Army service?

A. February.

Q. What? A. February, '44.

Q. February of '44. At that time were you under contract to Hollywood? A. Yes, sir.

Q. How long did you remain in the Army?

A. Twenty-seven months.

Q. You were discharged when?

A. May 5, 1946.

Q. Did you have any opportunities to play baseball in the Army? A. None whatsoever.

Q. What branch of the service were you in?

A. Air corps.

Q. You were not in practice during those years?

A. That's right. [49]

Q. I believe you say you were Army discharged on what date? A. May 5th.

Q. 1946? A. Yes.

Q. That was after the start of the playing season?

A. That's right.

(Testimony of Robert I. Knudson)

Q. In other words, you were a rookey pitcher and you went to war and came back? That is about the sum and substance of it? A. Yes, sir.

Q. Now, when you came back what did you do about reemployment?

A. I went and saw Mr. Reichow about three weeks after I was discharged.

Q. Did they give you a contract for the rest of the season?

A. Well, they put me under contract and optioned me to Fresno.

Q. I see. I hand you a contract between Hollywood Baseball Association and yourself, dated June 25, 1943. I ask you if that is the contract under which you played during the season '43 and to the end of the season.

A. That's right.

Q. That is the contract, is it? [50] A. Yes.

Q. And that provided for \$200 per month?

A. Yes.

Q. As your salary. Now, I hand you another paper which purports to be a contract between the Hollywood Baseball Association and yourself, dated May 29, 1946.

Is that the contract into which you entered with the Hollywood Club upon your return from service?

A. Yes, sir.

Q. This new contract called for \$250 per month salary, is that right? A. Yes, sir.

Mr. McCall: I will ask, if your Honor please, that the first contract be made Petitioners' Exhibit No. 10 and the second—

(Testimony of Robert I. Knudson)

The Clerk: Wait a minute. No. 9.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 9.)

Mr. McCall: And the second, Petitioners' 10.

The Clerk: Admitted, your Honor?

The Court: Yes. When they offer these exhibits, when there is no objection, show they are admitted.

The Clerk: Yes, your Honor. Those will be 9 and 10, respectively. [51]

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 10.)

Q. By Mr. McCall: Now, after you rejoined the club in May of 1946, how long did you remain with it?

A. I wasn't with them at all. I went directly to Fresno.

Q. You went directly to Fresno. I hand you another contract which is a contract between the Fresno Cardinals, Inc., and Robert I. Knudson, dated June 6, 1946, for \$150 a month.

Is that the contract that you entered into with Fresno?

A. Yes, sir, it is.

Mr. McCall: I will ask that that be made Petitioners' 11.

The Clerk: Petitioners' Exhibit No. 11 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 11.)

Q. By Mr. McCall: Now, the Fresno contract called for \$150 a month, and the Hollywood contract called for \$250 a month.

(Testimony of Robert I. Knudson)

How did you get paid under those contracts?

A. Fresno paid \$150 and Hollywood make up the difference: \$100.

Q. Did Hollywood pay you direct by check?

A. Yes, sir. [52]

Q. \$100 each month and Fresno the \$150?

A. That's right.

Q. That is what is called "optioning a player"?

A. That's right.

Q. All right. You were optioned to Fresno, and how long did you remain with them?

A. Approximately two months.

Q. Were you released by Fresno? A. Yes, sir.

Q. Now, on what date were you released?

A. July 29th, I believe.

Q. I will ask you if at the same time you received a telegram from Mr. Oscar Reichow advising you of your release by the Hollywood Club. A. Yes, sir.

Q. I ask you if this is the telegram to which you refer (indicating). A. That is it.

Mr. McCall: I will ask, your Honor, that this be made Petitioners' Exhibit 12 and ask leave to read the telegram:

"ROBERT KNUDSON

"FRESNO BASEBALL CLUB, FRESNO

"FRESNO HAS RETURNED YOUR CONTRACT TO US AND AS WE ARE FILLED UP WE ARE HEREWITH RELEASING YOU UNCONDITIONALLY AS OF THIS DATE.

"OSCAR REICHOW" [53]

(Testimony of Robert I. Knudson)

The Clerk: Petitioners' Exhibit 12 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 12.)

[PLAINTIFFS' EXHIBIT NO. 12]
WESTERN UNION

* * * * *

1946 JUL 29 AM 10 15

SA25 23=LOSANGELES CALIF 29 1002A
ROBERT KNUDSON=

FRESNO BASEBALL CLUB FSNO=
FRESNO HAS RETURNED YOUR CONTRACT
TO US AND AS WE ARE FILLED UP WE ARE
HERWITH RELEASING YOU UNCONDITION-
ALLY AS OF THIS DATE=

OSCAR REICHOW.

Case No. 6321 O'C. Wm. Barisoff vs. Hollywood
Baseball. Plf. Exhibit. Date 3/6/47. No. 12 in Evi-
dence. Clerk, U. S. District Court, Sou. Dist. of Calif.
Cross, Deputy Clerk.

No. 11706. United States Circuit Court of Appeals for
the Ninth Circuit. Filed Aug. 12, 1947. Paul P. O'Brien,
Clerk.

Q. By Mr. McCall: That telegram is dated July
29th.

Now, after that what did you do?

A. I went directly home, and I was home for about
two weeks.

(Testimony of Robert I. Knudson)

Q. Then what happened?

A. Then Fresno notified me if I wanted to, I could come back and finish the season with them and they would give me my release at the end of the season.

Q. Did you go back and finish the season with them?

A. Yes.

Q. I hand you another paper, which is a contract between the Fresno Cardinals and yourself, dated August 15, 1946, calling for a salary of \$200 a month.

Is that a new contract that you entered into upon your recall by Fresno? A. Yes, that is correct.

Mr. McCall: I will ask that that be made Petitioners' 13, if your Honor please.

The Clerk: Petitioners' Exhibit 13 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 13.)

Q. By Mr. McCall: No, how long did the season last [54] in Fresno? A. Until September 2nd.

Q. September 2nd. Did you receive any further payments from the Hollywood after your release by them July 29th? A. No. No, sir.

Q. Were you unemployed for two weeks and then back at \$200 with Fresno? A. That is correct.

Q. After the end of the Fresno playing season, on September 2nd, and then from approximately September 22nd, were you employed anywhere?

A. No. I enrolled in school on the 17th of September.

(Testimony of Robert I. Knudson)

Q. The 17th of September. And then you remained in school until when?

A. Until, I think it was, the 1st of January, the latter part of December.

Q. Now, Mr. Knudson, is it necessary to have training in order to pitch baseball well? A. Yes.

Q. You had been given no training when you came back the latter part of May? A. No, sir.

Q. About how many games did you participate in? Did you play in any games for Hollywood?

A. None. [55]

Q. About how many games did you participate in at Fresno?

A. Until my release, approximately seven.

Q. About seven? A. Yes.

Q. How many of those games were won?

A. I won one.

Q. Then after you returned—you didn't pitch a full game in any of those?

A. I believe I pitched one. I had won one and lost four before I was released.

Q. You pitched a full game? A. One.

Q. One game. Is that the one you won or not?

A. That is the one I won, yes.

Q. I see. After you returned there how many games did you participate in?

A. Approximately three or—three, I believe it was.

Q. Three. How did they turn out?

A. I won one and lost one.

Q. Have you been practicing since the close of the season? A. Yes, I have.

(Testimony of Robert I. Knudson)

Q. You are in good playing condition now?

A. Well, I am in fair playing condition, yes. [56]

Q. You are in better playing condition as a pitcher than you were last summer?

A. Yes, sir.

Mr. McCall: I believe that is all.

Q. By Mr. McCall: Oh! When did you first take this matter up with the Selective Service System?

A. After my release, about two weeks.

Q. About two weeks after your release?

A. Yes, sir.

Q. And they have been handling it for you; our office has been handling it for you ever since that time?

A. That's right.

The Court: Any cross examination?

Mr. Kanne: Yes, your Honor.

The Court: We have been waiting for you.

Cross Examination

By Mr. Kanne:

Q. After your discharge from the service on or about May 5, 1946, when did you make application to the Hollywood Baseball Association for reemployment?

A. I believe it was May 29—May 28th.

Mr. McCall: The contract is dated May 26th.

Q. By Mr. Kanne: Where is your home town?

A. Los Angeles.

Q. What high school did you play baseball with before [57] you contracted to Hollywood?

A. Fairfax High School.

Q. Was the Hollywood contract your first professional contract?

A. Yes, sir.

(Testimony of Robert I. Knudson)

Q. You testified that you played in a few games in 1943 for Hollywood? A. That's right.

Q. Did you pitch? A. Yes, sir.

Q. Did you start any games? A. No.

Q. Did you finish any games? A. Yes.

Q. How many innings did you pitch in some of the games that you played?

A. Oh, it run two or three innings.

Q. Do you recall whether or not any of those games were won by Hollywood?

A. No, I don't believe any of them were won.

Q. In 1946, after you were reemployed by the Hollywood Baseball Club, were you retained with the team at their home field when they were playing there?

A. No, I wasn't.

Q. Were you there for any length of time whatsoever [58] after you signed the contract?

A. None whatsoever.

Q. You went directly to Fresno?

A. That's right.

Q. How much did you receive altogether from the Hollywood Baseball Club during 1946, direct from the Hollywood Baseball Club?

A. I don't know exactly. It was a little over \$200, I believe.

Q. Was it at the rate of \$100 per month from May 26th until the time you were first released by Fresno in July, July 29th? A. That's right.

Q. At the rate of \$100 per month from May 26th to July 29th? A. That's right.

Q. Just a little over \$200, in other words?

A. That's right.

(Testimony of Robert I. Knudson)

Q. How much did you receive from the Fresno Ball Club during 1946?

A. Approximately \$300. I don't know the exact figures.

Q. Well, you were paid at the rate of \$150 a month by Fresno for two months on which Hollywood was also paying, is that correct?

A. That's right. [59]

Q. And that was \$300 you received from Fresno?

A. Yes.

Q. Then when you were rehired by Fresno, how much did you receive under your rehiring?

A. It was on the basis of \$200 a month. I don't believe there was a full month left.

Q. Do you recall what your last pay check was for the last period?

A. Roughly \$170, I would say roughly.

Q. That was \$200, less your deductions for withholding?

A. This was with deductions included.

Q. Did you receive any other baseball earnings during 1946 or up to the present time?

A. None whatsoever.

Mr. Kanne: That is all, your Honor.

The Court: We will recess until 1:45.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 1:45 o'clock p. m. of the same date.) [60]

Los Angeles, California, March 6, 1947, 2:00 o'clock
P. M.

The Court: Proceed.

Mr. McCall: Mr. Dawson, will you take the stand,
please?

HUBERT L. DAWSON,

called as a witness by and on behalf of the government,
having been first duly sworn, was examined and testi-
fied as follows:

The Clerk: Your full name?

The Witness: Hubert L. Dawson.

The Clerk: Is that D-a-w-s-o-n?

The Witness: Yes, sir.

The Clerk: Take the stand, please.

Direct Examination

By Mr. McCall:

Q. Mr. Dawson, what is your age, please, sir?

A. Twenty-six.

Q. How long have you been playing professional base-
ball?

A. This is my second—two and a half full years.

Q. Two and a half years of baseball?

A. Yes, sir.

Q. When did you first play it? A. 1942. [61]

Q. That has been your business, the way you have
been making your living since that time?

A. Besides being in the service, yes, sir.

(Testimony of Hubert L. Dawson)

Q. All right. With whom did you sign? What team did you sign with for the year 1942?

A. I was with Olean, New York, and Santa Barbara, California.

Q. What position did you play?

A. Third base.

Q. Did you play shortstop, too, at any time?

A. Not in 1942.

Q. Not in 1942? A. No, sir.

Q. In what class leagues were those teams?

A. Class "C" and "D."

Q. In 1943 did you sign with the Hollywood Club?

A. Yes, sir.

Q. At the beginning of the season?

A. Yes, sir, during spring training.

Q. And you sent through spring training?

A. Yes, sir.

Q. Did you thereafter play with the team?

A. I was carried on the roster, merely used in pinch-hitting roles about five times.

Q. And subsequently were you optioned to any other [62] team? A. Yes, sir.

Q. What team?

A. Memphis and the Southern Association.

Q. The Southern Association is in what class?

A. A-1.

Q. A-1? A. Yes, sir.

Q. That is the grade next below Hollywood?

A. At that time, yes, sir.

Q. Did you complete the season at Memphis?

A. No. I was called into the service July 1, 1943.

(Testimony of Hubert L. Dawson)

Q. How long did you stay in?

A. Until June 24th.

Q. What branch of the service were you in?

A. Marine corps.

Q. Now, did you play baseball any of the balance of the 1943 season or the season of '44?

A. No, sir.

Q. Or '45? A. No, sir.

Q. In other words, you were in the business of fighting the war? A. Yes, sir.

Q. When were you discharged? [63]

A. I was separated from the service on April 6, 1946, but my terminal leave didn't end until April 20, 1946.

Q. So that you actually were formally released on April 20th? A. Yes, sir.

Q. Were you released to inactive duty?

A. Yes.

Q. You are still a member of the Marine Reserve, though, are you? A. Yes, sir.

Q. When did your terminal leave begin?

A. April 6th.

Q. Did you report to the Hollywood Club for spring training?

A. I had just returned from overseas on February 4th, and I hadn't been separated from the service, but I reported for spring training upon my own. In other words, I wanted to play and try to get in shape before I was separated from the service.

Q. So you had played with them in spring training during your terminal leave? A. No, sir.

(Testimony of Hubert L. Dawson)

Q. No?

A. It was during my own time. In other words, when my C. O. saw fit that I could be released, I had a few days at [64] camp; then there would be several days I had to stay at the camp.

Q. I see. In other words, spring training was in March, wasn't it?

A. Spring training was in progress, but I hadn't signed for anything that way.

Q. When did you sign with Hollywood?

A. It was April 6th or 7th, '46.

Q. Do you have a copy of the contract?

A. I don't have any copy, no, sir.

Mr. McCall: Do you have it, counsel?

Mr. Kanne: Yes.

Q. By Mr. McCall: I hand you a contract between Hollywood Baseball Association and yourself, dated April 15, 1943, and ask you if that is the contract under which you played baseball in the year 1943.

A. Yes, sir.

Q. And your salary at that time was \$300 a month, is that right? A. Yes, sir.

Q. Now, how much did Memphis pay you when you went there? A. The same price.

Q. The same price? A. Yes, sir. [65]

Mr. McCall: I ask, your Honor, that this contract be made Petitioners' exhibit next in order.

The Clerk: That will be Petitioners' Exhibit No. 14 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 14.)

(Testimony of Hubert L. Dawson)

Q. By Mr. McCall: Now, I show you another paper which purports to be a contract between the Hollywood Baseball Association and yourself for the 1946 season at \$375 per month, dated April 1, 1946.

I will ask you if that is the contract under which you agreed to play baseball for Hollywood during 1946.

A. On this April 1st, I don't know whether it was the 1st of April or not. I can't swear to that because I was not separated from the service, and I didn't ask for reinstatement until April 6th. But that is—(pause).

Q. That is the contract? A. Yes, sir.

Q. That was signed? A. Yes.

Mr. McCall: All right. I ask that that be made Petitioners' Exhibit 15.

The Clerk: Petitioners' Exhibit 15 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 15.) [67]

Q. By Mr. McCall: Now, after that contract was signed did you have a conversation with Mr. Reichow about whether you were going to stay with the team at the time you signed the contract or about that time?

A. Before I was even out of the service they told me I was going to be released; in other words, I wasn't in the plans for the team. I hadn't even signed my contract.

Q. Who told you that?

A. Mr. Reichow and Mr. Fausett.

Q. After you were out of the service you did sign the contract?

A. I signed that contract, yes, sir.

(Testimony of Hubert L. Dawson)

Q. When were you released?

A. April 14, 1946.

Q. Thereafter did you secure employment with some other team? A. Yes, sir.

Q. What team?

A. Yakima, Western International League.

Q. Is that the same team that Mr. Lilly was with?

A. Yes, sir.

Q. What contract did you have with them, what price?

A. I had a contract for \$200 a month plus a bonus of \$450 upon signing.

Q. Do you have a copy of that contract? [67]

A. Yes, sir.

Q. You have handed me a contract between the Yakima Baseball Club and yourself, dated April 24, 1946, is that correct? Is that the contract you speak of?

A. Yes, sir.

Q. This is your copy? A. Yes.

Mr. McCall: I will ask that this be made Petitioners' exhibit next in order.

The Clerk: That will be 15 in evidence.

Mr. McCall: 16.

The Clerk: 16 in evidence.

(The document referred to was received in evidence and marked Petitioners' Exhibit No. 16.)

Q. By Mr. McCall: Now, when did the Yakima season start? A. April 26th.

Q. Did you play the rest of the season with them?

A. Yes, sir.

(Testimony of Hubert L. Dawson)

Q. What position did you play with them?

A. Shortstop, second base.

Q. How many games did you play altogether?

A. 143.

Q. What was your batting average?

A. .262. [68]

Q. How many runs did you score? A. 130.

Q. 130? A. Yes, sir.

Q. How is that standing? Is that a good scoring average? A. I was second in the league, is all.

Q. Second in the league?

A. Yes, sir.

Q. By "the league" you mean eight teams?

A. Yes, sir.

Q. Are you under contract to play for Yakima next year? A. Yes, sir.

Q. That is a part of the contract that you made with them on this uniform players contract, is that right?

A. Yes, sir. That is a binding contract for the next year.

Q. When does the spring training start at Yakima?

A. The 27th of March.

Q. Have they offered you a contract for next year?

A. Yes, sir.

Q. At what price? A. \$300.

Q. I believe you indicated that you would like to be reinstated on the Hollywood team? [69]

A. Yes, sir.

Q. When did the Yakima season stop?

A. September 8, 1946.

(Testimony of Hubert L. Dawson)

Q. Other than playing ball, did you have any earnings of any kind between September 8th and September 22nd?

A. One exhibition game which was after the season had finished that we had gotten up ourselves: \$60.

Q. Was that a Yakima team show or play exhibition game?

A. Yes, sir. But we put it on, and our president sanctioned it, okayed it; and we played the Valley All Stars for our transportation money home.

Q. I see. Now, is that all the money that you received of any type playing baseball in 1946?

A. Yes, sir.

Q. You didn't have any earnings from any other source? A. No, sir.

Mr. McCall: That is all.

Cross Examination

By Mr. Kanne:

Q. You testified that you signed that contract either on April 1st or April 6th or in that—

A. It was in that period of time.

Q. —period of time. When did you actually start on the Hollywood payroll in 1946?

A. 1946? The date of the contract. I don't have any [70] contract; so it is in that period. It was dated there April 1st.

Q. How long did you stay on the Hollywood payroll?

A. They gave me two weeks' pay, but I didn't stay there that time.

Q. How much did you get from Hollywood?

A. \$187.50.

(Testimony of Hubert L. Dawson)

Q. During the period that you were with Yakima from April 24th to September 28th, you were paid during that entire time at the rate of \$200 a month?

A. Yes, sir. September 8th that was, not 28th.

Q. September 8th? A. Yes, sir.

Q. Do you know what the total amount was that you did receive from Yakima?

A. Yes. \$1396, including the exhibition.

Q. How much?

A. \$1396, including the exhibition game: \$60.

Q. That is \$1396? A. Yes, sir.

Q. Did it include the bonus, too?

A. Yes, sir.

Q. Did you play for anyone else at any time since you went back with Hollywood in 1946, other than Yakima?

A. No, sir. [71]

Mr. Kanne: That is all.

The Court: That is all.

(Witness excused.)

Mr. McCall: I believe that completes the petitioners' case, your Honor.

The Court: I cannot hear you. Speak a little louder.

Mr. McCall: That is the petitioners' case, your Honor.

The Court: All right.

Mr. McCall: If your Honor will permit me, I would like to move to make some amendments on page 5 of the petition by interlineation.

The Court: What are they?

Mr. McCall: It is paragraph V, line 8, "Position Played" under the name "William Barisoff." I would like to insert "outfielder" after the word "pitcher," making it "pitcher-outfielder."

Mr. Kanne: What page?

Mr. McCall: Page 5 of the petition.

Mr. Cannon: That is the player.

Mr. Kanne: Page 3.

Mr. McCall: And on page 3, line 24, if your Honor please, "Loss of Wages to Date," under the name "Robert I. Knudson" I ask leave to amend the figure "\$550" to "\$308.21."

And in the same line under the name "Hubert L. Dawson, Jr.," to strike the figure "\$763" and insert "\$1185." [72]

Now, if your Honor please, in the petitioners' trial memorandum, which was presented this morning, there are a number of changes that need to be made in some of the figures there. I would like to amend it.

On page 2, line 19, the figure is given as "\$185 per month" as Barisoff's wage at the Bremerton Club. That should be changed to "\$175" instead of "\$185."

The Court: Petitioners rest?

Mr. McCall: Yes, sir.

Mr. Kanne: Pardon, sir?

The Court: You may proceed. The petitioners rest.

Mr. Kanne: Mr. Reichow, please.

OSCAR REICHOW

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Oscar Reichow, R-e-i-c-h-o-w.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Kanne:

Q. Are you employed by the Hollywood Baseball Association? A. I am.

Q. In what capacity? [73]

A. As business manager and secretary.

Q. How long have you held that position with the ball club? A. Eight years.

Q. Did that include all the periods of time which have been referred to in this trial so far?

A. It does.

Q. Will you please describe briefly what other positions you have held in the field of baseball?

A. Well, before coming to Los Angeles I was a newspaper man at Chicago as a baseball writer for 14 years, and I was in the position of vice president and secretary-business manager of the Los Angeles Ball Club for 16 years before joining the Hollywood Club.

Q. In the position that you now hold with the Hollywood Baseball Association describe briefly what your duties are in connection particularly with the hiring and releasing of baseball players.

A. Well, I have the position of signing baseball players after they are recommended to the office by our

(Testimony of Oscar Reichow)

scouts and by our manager, and then when the manager decides that a ball player doesn't qualify for a position on the ball club, he refers it to me and I have the duty of releasing the ball player through the method of organized baseball play giving him an unconditional release and optioning out to some other [74] ball club for the balance of the year.

Q. In making those decisions to hire or to release a ball player, do you use your own independent judgment as well as collaboration, that is, with the recommendation of the managers or coaches of your club?

A. No. I generally rely on the coaches and the managers, on their judgment as to whether a ball player qualifies for a position or not.

Q. Do you have a baseball player limit on the Hollywood Ball Club?

A. Yes. We have a league limit of 25 men. We have a limit of 37 men up to within 30 days after our season opens up, after which time we must reduce to 25 men for the year.

Q. Does that mean that you may maintain only 25 men on your active Hollywood roster present with the Hollywood Star Baseball Team? A. That's right.

Q. Is it the normal practice of the Hollywood Baseball Team, as well as of other baseball teams in the professional leagues to hire more players during the course of a year than they are allowed to maintain on their own roster within that player limit?

A. Up to 30 days after our season opens we are allowed to carry 37 men. As a consequence, we do take on a lot of more players than we need on our ball club. [75]

(Testimony of Oscar Reichow)

Q. What is the general purpose of hiring those additional players?

A. Well, the idea is for development of young ball players, to give them an opportunity to play professional baseball; and if they don't make our ball club, to send them out for additional experience to the various classifications, lower classifications than our own.

Q. Are many of these players, in other words, untested at the time and unproven at the time that you enter into contracts with them?

A. Yes, many of them are. Boys that we pick off of college teams, high school teams, semi-pro lots, they are untested.

Q. In entering into contracts with them do you rely upon the fact that the contracts are terminable at the will of the baseball club?

A. That's right. That is part of the baseball law.

Q. What is the general procedure that you adopt with these men who are inexperienced and untrained, that is, where do you keep them or what do you generally do with them after you have entered into a contract with them?

A. Well, the first thing we do is take them into spring training camp, give them at least 30 days' trial to prove to the manager and the coach that they qualify to be sent out or to be retained. Very often we carry them for probably a [76] month after our season opens up, particularly if they are young ball players who have never signed a professional contract before. It is a baseball rule that the first-year man who first signs his professional contract must be carried, paid a salary until the other minor leagues open up, which many of

(Testimony of Oscar Reichow)

them do not until the latter part of April and the first part of May. So as a consequence, we carry them on the ball club for a month and pay them a salary if they show prospects of becoming a good ball player.

Q. Are some of them released after the 30-day period of training with the ball club? A. Yes, sir.

Q. And some are farmed out to leagues of lower classifications? A. That is correct.

Q. And some, if they show unusual prospects, may be retained for a further period of time with the Hollywood Ball Club itself? A. That's right.

Q. When you farm them out to clubs in leagues of lower classification, who generally pays the salary?

A. The lower classification pays what salary it can, and we make up the differential.

Q. In many cases does the lower club pay the entire salary in some cases? [77] A. In some cases.

Q. But more often Hollywood Club has to add something to it? A. That's right.

Q. What then would you say is the status of the players who are farmed out, although under contract with the Hollywood Ball Club, with regard to the tenure of their employment, particularly?

A. Well, the player is out on option, and they are on our reserve list; and we send them out on option with the hope that they will develop so we can recall them at the end of the year. Their contracts, according to baseball law, belong to the Hollywood Baseball Club.

(Testimony of Oscar Reichow)

Q. Generally speaking, is there a considerable difference in skill between the players that you farm out and those that you retain on your regular roster?

A. Oh, yes. There is a lot of difference. If a player showed sufficient skill to remain with us and play in an AAA league, we would surely retain him. But if he doesn't, we send him down to the league in which we think he can play, like "D," "C," "B," or "A" league, depending on what ability he shows during spring training.

Q. Is the tenure of employment or the security of the job of the player that is farmed out, is it less secure than that of a regular player who is playing on the Hollywood Ball [78] Club?

A. Not necessarily.

Q. Do his seniority or length of service have any bearing on whether a player is retained or released? In other words, is the length of time a man has been with the club any criterion as to when he will be released?

A. Not necessarily. If a boy comes in and shows the ability to remain on our ball club and take the position away from an older man, he has that opportunity.

Q. Isn't the criterion of whether a man may remain on your club his professional skill, his ability to play professional baseball?

A. That's right.

Q. Is this same criterion generally applicable throughout baseball?

A. That is customary throughout any league in baseball.

Q. Do you know each of the petitioners?

A. I do.

(Testimony of Oscar Reichow)

Q. With respect to each of the petitioners, I will ask you as to them individually for the purpose of keeping the record straight this question: whether or not during the periods before their entry into military service—what was the character and nature of employment of these particular individuals?

A. Well, most of them— [79]

Q. (Interposing) Will you please reply specifically as to Barisoff?

A. Specifically as to Barisoff, Barisoff was strictly a prospect, a play whom we hoped would develop sufficiently to remain with our ball club after he had sufficient experience in lower classifications.

Q. Was he used on the Hollywood Ball Club itself before his entry into military service?

A. Very little.

Q. Now, with respect to Dawson, what was his status with the Hollywood Ball Club prior to his entry into military service.

A. Dawson was in the same category with Barisoff, strictly a prospect, as was shown that we had him in spring training of the year we sent him to Memphis. We sent him to Memphis for the purpose of development.

Q. How about Knudson?

Q. Knudson was in the same category, just strictly a prospect out of high school. We carried him that year to help him as much as possible when he went into the service.

(Testimony of Oscar Reichow)

Q. How about Lilly? How about his pre-war service with the ball club?

A. Well, Lilly, with his pre-war service with our ball club, was in the capacity of more or less a utility man.

Q. Was he considered a regular? [80]

A. No. If he were a regular, he would have played regularly.

Q. At the time that Lilly did play with the ball club in 1943 as a utility man, was the caliber of baseball being played by the team the general standard over the years that was set for the Hollywood Baseball Club?

A. No. During those years what we termed the "war years" the standard of play in the Pacific Coast League and throughout all the leagues was much lower.

Q. At the time that Lilly played on your club and at the time that Knudson was signed in early 1943 and Dawson in '43, were many of your players that were considered your regular players gone off to war?

A. Yes, quite a few of them.

Q. Were any of these men ever considered as regular Hollywood Ball Club players?

A. No, they were not.

Q. There have been offered in evidence various contracts which are standard contracts of the National Association of Professional Baseball Leagues. Are you familiar with those?

A. I am.

Q. Do they provide anything with regard to the obligations of the player during his off-season period, that is, while the regular league, or, the regular season

(Testimony of Oscar Reichow)

is not in [81] progress? Do they obligate him in any way?

A. Yes. They have a clause in that contract where a player agrees not to play any baseball after the 31st of October or participate in any football or basketball games.

Q. Is that obligation not to otherwise engage in baseball or sports up to the time when your privilege of renewing the contract may be exercised?

A. Until he reports for spring training the following year.

Q. At the time that these players returned after their military service and were rehired by the Hollywood Baseball Club at or about the dates that have been indicated in the testimony, were they thoroughly tested or were they tried out before they were signed or after they had signed the contracts?

A. I think they were all thoroughly tested during our spring training trip.

Q. Were they signed on the contracts with the expectation that you have previously stated that they are to be held as prospective and inexperienced players?

A. Yes, they were.

Q. In other words, did you intend them to increase in ability to become more valuable to you? Is that the hope with which they were resigned?

A. That is the only hope you can have when you take a young ball player and take him into spring training: that he [82] will show sufficient merit to remain on your ball club.

Q. After the period of play and training which you had, that each of these petitioners had with the Holly-

(Testimony of Oscar Reichow)

wood Club after their military service, did they show the qualifications necessary to perform as baseball players of the Hollywood Ball Club?

A. Apparently not because the manager and the coach did not think they had sufficient qualifications to remain on our ball club to bring our club up to the standard of play that we felt we needed for 1946.

Q. Do you have any independent opinion of your own as to player Barisoff, as to whether you thought he would be a satisfactory prospect and should be kept?

A. No, sir, I did not. That was strictly up to the manager and the coach.

Q. Did you have any opinions on any of the other players?

A. No, sir, I did not.

Q. Are you familiar with the methods used by professional baseball managers, coaches, in judging players?

A. I am.

Q. Do you know whether or not there is any formula or any method of computing statistics or any standard of that nature that can be used in judging whether or not the baseball play has the skill and ability— [83]

A. (Interposing) No, there is no particular formula that they use; and they don't rely on statistics of what a player did the previous year. When they take a man into spring training they give him a lot of instruction as to how to play, how to hit and how to run and do a lot of things; and they watch him carefully, and they form their own judgment that the ball player just doesn't have the ability to remain on the ball club. It is their judgment.

Q. In other words, whether a ball player is retained, a new one is hired or whether they are released is de-

(Testimony of Oscar Reichow)

pendent upon the judgment of the coach or manager or a combination of both, based upon their experience in evaluating the worth of players?

A. That's right.

Q. Is any definite period of time of observation necessary to arrive at such a judgment?

A. I don't think so. Sometimes you can take a look at a ball player for two or three days and decide that he is not going to do you any good.

Q. In other words, if a man is of a lesser degree of skill or one that is, you might say, obviously not qualified or not a good prospect, then you in some cases make judgment on him in a very short time?

A. I think some managers and some baseball men can, yes. [84]

Q. Can such a judgment be fairly arrived at upon the basis of a training camp experience?

A. Absolutely.

Q. Are baseball games included in the training camp, that is, practice games?

A. Yes. We play exhibition games just for the purpose of ascertaining whether these small players can hit, run and field.

Q. Do you feel that each of the petitioners in this case was given a fair test to show his ability after being rehired by the Hollywood Baseball Club?

Mr. McCall: I object to that, your Honor. The witness testified he had no opinion about the ability of these men.

Mr. Kanne: He could evaluate the judgments and recommendations. He said that he might not be qualified himself to determine whether the players had the skill

(Testimony of Oscar Reichow)

and ability, but he can say whether or not the period of time in which the coaches and managers observed them was sufficient to allow them to form an opinion.

The Court: I shall let him answer. It goes to the weight of it. I shall let him answer it.

The Witness: Yes, I think all the boys had sufficient time to prove their ability.

Q. By Mr. Kanne: Do you know why he was discharged? A. Why? [85]

Q. Yes. A. Yes.

Q. Why?

A. Because he didn't possess the qualifications to play on our ball team.

Q. That is true with respect to each of the petitioners?

A. That's right.

Mr. McCall: If your Honor please, I want to object to that question and answer on the ground that the witness has already testified he did not evaluate these men, and he has no opinion about the matter.

Now he says that he knew they were discharged because they did not possess those qualifications.

The Court: You will have to lay a foundation as to whether this witness has knowledge sufficient to give that opinion. Any man on the street could give that. You have to show that he has had some experience or some qualification to express that opinion. Show that he is qualified.

If he came in contact with these men and had experience with these particular men in question here, he could probably express an opinion. But you have to qualify him first.

(Testimony of Oscar Reichow)

I shall sustain the objection to that until you qualify him.

This man says he was the secretary and business manager [86] of this respondent. Now, was he the man who managed and determined and came in contact with all the effort and playing of these men? That is another question. Whether he was or not, I do not know. He has not said he has yet.

Q. By Mr. Kanne: Upon whose recommendation was each of the players discharged?

A. On the manager's.

Q. And anybody else's?

A. Well, I presume in collaboration with his coach, Mr. Thurston.

Q. What was that recommendation of the manager in the case of each man?

A. Well, the recommendation was that he did not think that each or any one of them would help our ball club for the season.

Q. There has been testimony to the effect that petitioner Lilly played with the Hollywood Baseball Club for a period of time during 1946 after he was rehired.

Can you tell us what the occasion of using him on the Hollywood team was, if any?

A. Well, that year '46 we started out with a second base man by the name of Woodrow Williams who broke his leg, I believe on the 28th of April, after which time we put Lilly in at second base; and later we found it necessary to go out and buy another second base man to take his place. [87]

(Testimony of Oscar Reichow)

Q. Do you know what his batting average was during the time that he was on the Hollywood Club then?

A. I think it was around .225.

Q. Was it necessary to replace him?

A. It was. That is the reason we bought another second base man.

Mr. McCall: As to whether it was necessary, I object to the question. The witness has not shown any knowledge about whether it was necessary or not. He testified he hires and fires these men at the direction of the manager.

The Court: He has not been qualified yet to answer this question. He just said this other man broke his leg.

This man who broke his leg: how long was he injured? Did he play any at all after that?

The Witness: No, he didn't play all season, Judge, until, I believe, the last week or two of the season. He was out all year long.

The Court: You say you had to get someone to replace him?

The Witness: That's right.

Q. By Mr. Kanne: In other words, your regular second base man that you started the season with was Williams, and he went out with a broken leg early in the season?

A. That's right.

Q. And you used Lilly for a period of time thereafter? [88]

Q. As he testified?

A. That's right.

Q. Then was a different player hired by the ball club to play second base?

A. Yes, Glen Stewart.

(Testimony of Oscar Reichow)

Q. Did he thereafter play that position for the team?

A. He played, I believe, every ball game after that time.

Q. And Lilly was no longer used?

A. That's right.

Q. When was the Hollywood Baseball Team changed to a Class AAA league, or the Pacific Coast League changed to that?

A. Last season.

Q. What was it prior to that?

A. AA.

Q. What is the general distinction between AAA league and AA league?

A. The general distribution of the AAA league is just a classification higher, and it is assumed that with the higher classification you play a better standard and a higher standard of baseball and you pay higher salaries and get better ball players for your club.

The Court: What cities are in this thing?

The Witness: San Francisco, Oakland, Sacramento, Seattle, [89] Portland and San Diego.

Mr. Kanne: No further questions.

Cross Examination

By Mr. McCall:

Q. Mr. Reichow, with regard to Mr. Lilly you had a conversation with him at the beginning of the season about going to Birmingham, didn't you?

A. Birmingham?

Q. Yes.

A. Not to my knowledge.

Q. You recall his testimony about that this morning?

A. I do.

Q. Well, that could have happened, couldn't it?

A. It could have.

(Testimony of Oscar Reichow)

Q. Now I am asking you this to see if it is correct, that Mr. Williams got hurt up there and you then needed Mr. Lilly on the team actively to play, did you not? Or do you know about that?

A. Yes, I know about it. At that time I don't believe we had another second base man; so Lilly was necessarily put in at second base.

Q. So then during the period thereafter you secured somebody that Mr. Fausett thought would be a better man?

A. That's right.

Q. Thereafter did you place Mr. Lilly anywhere? [90]

A. Did I?

Q. Yes.

A. In all probability.

Q. But the Birmingham opportunity had gone by at that time?

A. I don't recall that Birmingham was interested in Mr. Lilly.

Q. Well, the best thing you could do with this veteran, then, after securing a man you thought would be a better player, was just fire him? That is what you did?

A. Well, you put it in that phraseology. Yes. But it is baseball law that we have to unconditionally release a player if we don't retain him.

Q. What do you mean by "retain him"?

A. Keeping him on the ball club.

Q. On your active ball club?

A. That's right.

Q. Now, if you farm him out or option him out, that is not retaining him, is it?

A. No.

Q. So you can have any number of men in reserve that you want to, can you not?

A. No.

Q. How many?

A. Twelve. [91]

(Testimony of Oscar Reichow)

Q. Twelve. Is that the difference between the 25 and the 37? A. That's right.

Q. You mean that you are at all times limited to 37 men? A. That's right.

Q. What does a regular first-string ordinarily consist of? Nine players?

A. That depends on the manager's judgment. That is under his control, not mine.

Q. How many contracts can the club give out in a year? A. During the year, 37.

Q. Well, if they have some in reserve and send some out, they can have any number they want to?

A. Not above 37. Let me straighten you out on one thing. During the war period each baseball club could have one player for every five on the 25. In other words, that gave us 30 ball players on our reserve list due to the fact that baseball players were scarce and it was difficult to obtain them. So through baseball law we had that privilege of having one extra player for every five on our ball club. That was during the war period. Our limit is 25. We can carry one extra man for each five during the war.

Q. Now, at the present time, or last year, you could carry more than that? [92]

A. No. Thirty men was all we could carry.

Q. Thirty?

A. Thirty, if we wanted to carry them.

Q. Well, I thought you testified a while ago that up to 30 days after the season opened you could carry 37 men. A. No, no. You misunderstood.

(Testimony of Oscar Reichow)

Q. You did not testify to that?

A. You misunderstood. Thirty-seven was the limit that we are allowed, according to baseball law; but during the war period we had that extra number of five men that we could carry during the war period, only five, during the playing season.

Q. During the playing season?

A. That's right.

Q. How many could you carry? You gave the figure 37. What is the 37 you are talking about?

A. Thirty-seven is the limit that each AAA club can have on its reserve list.

A. That's right.

Q. You mean that they can have 37 men in reserve?

A. In reserve, yes.

Q. And 25 active?

A. No, not "and 25 active men." The 25 active men become active after the season opens up, 30 days after the season opens up.

Q. Well, has the 37 anything to do with the 25? Are they included in the 37?

A. Yes, the 25 is included in the 37.

Q. So that at the present time you can have more men in reserve than you could during the war? Is that what you mean?

A. No, not now. We are allowed only 37 men now. The war is over.

Q. What is it that you were allowed the 30 men for during the war?

A. During the war period because it was difficult to get players during the war period.

(Testimony of Oscar Reichow)

Q. And what players were they, that is—

A. (Interposing) Any players we could pick up, whether active or not, or anybody we wanted to carry on our ball club.

Q. Whether they were active or in reserve, you were limited to 30 during the war?

A. Yes, 30 days after the season started, yes.

Q. At the present time you have 37?

A. That's right. We have 37 now, but 30 days after our season opens up we must cut down to 25.

Q. On the active list? A. That's right. [94]

Q. This 25 includes men in reserve and men on option and all types of men that you have contracts with?

A. Not the 25.

Q. How is that?

A. Not the 25 that we carry after 30 days after our season opens up. We are allowed 12 men to send out on option after the season opens up.

Q. When that season opens up you can have 25 men on the active payroll? A. Yes.

Q. On your club actively playing ball and 12 more you can send out—

A. (Interposing) Send out on option.

Q. On option? A. That's right.

Q. I don't want to discuss this too far, Mr. Reichow, but I do not understand how it is that you can have 30, only 30 during the war and now you can have 37 active and on option. A. No. During—

Q. (Interposing) In the playing season?

A. No.

(Testimony of Oscar Reichow)

Q. Will you explain to the judge so the judge can understand it? I cannot understand it.

A. It is baseball law that clubs in AAA are allowed 37 [95] men on their reserve list. That means players, for instance, we will say, from the close of the season until the following season opens up. We are allowed to have 37 men. Then 30 days after our season opens up we must cut back to 25, which then allows us 12 men to put out on option to other ball clubs.

Q. And the figure 30, now means that they allow you to have 5 in reserve?

A. That was during the war period. After 30 days, after the season was opened, we could carry 30 men instead of 25. But now the war is over we revert to the 25 instead of the 30.

Q. Do you recall having a conversation with Mr. Dawson before his contract was signed with him in which you told him that he was going to be released right away?

A. No, I do not.

Q. Upon whose recommendation did you give him a contract?

A. Upon whose recommendation?

Q. Yes.

A. He had signed with us in '43, and I believe he was recommended to our ball club by one of our scouts who then at that time was Marty Krug.

Q. Well, he was entitled to be reemployed, was he, by your club?

A. Yes. [96]

Mr. Kanne: I object to that as a conclusion.

Q. By Mr. McCall: How did you come to give him a contract?

A. When? What year?

(Testimony of Oscar Reichow)

Q. 1946.

A. 1946? Because he was a National Defense ball player. He was placed on the National Defense List when he left the Memphis Ball Club to go into service.

Q. And the National Defense List of Organized Baseball is a list kept at Judge Bramham's office, isn't it?

A. Correct.

Q. And he is the man who directs what man shall be reemployed by which club? That is correct, isn't it?

A. Yes.

Q. Now, with respect to Mr. Dawson I will ask you if it is not a fact that Mr. Bramham, Judge Bramham, as the president of the Association of Organized Baseball, instructed you to reemploy him.

A. No, he didn't instruct me at all.

Q. Well, what did he do?

A. He reinstated him to the active list of the Hollywood Baseball Club.

Q. Yes. That is because at the time he left he was carried on the active list of the Hollywood Club, wasn't it?

A. He was on the Memphis Club at the time he went into [97] the service.

Q. Why was he restored to your club?

A. Because he was optioned out to Memphis, and his contract, according to baseball law, belonged to the Hollywood Ball Club.

Q. He was obligated to play for you; so that is why you had to reemploy Mr. Dawson, the fact that he left Memphis, actively playing at the Memphis Club didn't make any difference under baseball law, did it?

A. No, sir.

(Testimony of Oscar Reichow)

Q. The same is true, is it not, with respect to each of these men? A. That's right.

Q. They were all carried on the National Defense List? A. That's right.

Q. And were entitled under baseball law to be re-instated? A. That is correct.

Q. On the reemployment of a man coming back from the service isn't it a part of the regulations that they were to receive an increase of 25 per cent of their wage at the time they entered the service?

A. That is correct.

Q. So that the increases that were given to these men were in conformity with that policy? [98]

A. That's right.

Q. Which was general throughout organized baseball? A. Correct.

Q. Now, referring to the standard form contract I will ask you if this isn't correct: that a player who signs this standard form is obligated to report for spring training with the employing club at the beginning of the next season if the club wants him.

A. He is not obligated. If the player does not agree to terms with the club, he has no obligation.

Q. Well, now, let me ask you about clause 8(a):

"Each year, on or before March 1st (or if Sunday, then the succeeding business day) next following the playing season covered by this contract, by written notice to the Player, the Club or any assignee thereof, may renew this contract for the term of that year except that the salary rate shall be such as the parties may then agree upon." A. Right.

(Testimony of Oscar Reichow)

Q. He is obligated to play the next year?

A. It says "may" in there, doesn't it? "May renew the contract"?

Q. The club may renew it?

A. The club may renew it with the player if they agree on the terms, correct. [99]

Q. If you find some difference, there would be no contract? A. That is right.

Q. "(b) under clause "8" is this:

"In default of agreement by the parties, the salary rate shall be determined as provided in paragraph 9, but pending such determination and final decision rendered, the Player will accept the salary rate fixed by the Club or else will not play otherwise than for the Club or for an assignee hereof." That is part of the contract, isn't it? A. That's right.

Q. So that he is obligated to play, even though they don't agree as to the wage that is offered.

A. If he desires to play baseball, yes.

Q. In other words, he can't play anywhere else in organized baseball? A. No, sir.

Q. All right, that is what I wanted to get.

"(c)" is:

"The reservation to the Club, expressly granted and agreed to by the Player, of the valuable and necessary right to renew this contract and to fix the salary rate for the succeeding year, and the promise of the Player not to play during said year [100] otherwise than with the Club or an assignee hereof, have been taken into consideration in determining the aggregate or monthly salary specified herein and the undertaking by the Club to pay said salary is the consideration for the Player's

(Testimony of Oscar Reichow)

services, the reservation, and renewal option granted and promise made." That is correct, isn't it?

A. Yes.

Q. Now, in the case of disputes, it is provided in clause 9 that:

"In case of disputes between the Player and the Club or any assignee hereof arising under the provisions of this contract the same shall be referred to the Executive Committee or the Commissioner as the case may be, as an umpire, and the Committee's decision shall be accepted by all parties as final, subject only to such right of appeal, as is given to the Player only, under the terms of the National Association Agreement and Major-Minor League Agreement and Rules." That is correct, is it?

A. That's right.

Q. So that a man who signs one of these contracts, uniform contracts, must play for that club; and unless he can [100] convince the committee or the umpire that he is entitled to the wage he demands after he signs the contract for the next year, he cannot play anywhere else, can he?

A. In organized baseball, no. He could go to Mexico.

The Court: It might be pretty hard on him, would it not?

Q. By Mr. McCall: Now, to change over from the grade AA to the grade AAA club, you say that more money is paid to the player if it is an AAA club?

A. That's right.

Q. And that is the reason why you expect better playing baseball in an AAA club?

A. That is only natural. If you get better ball players, you pay them better salaries.

(Testimony of Oscar Reichow)

Q. Suppose that you assign a man to a club without any right to recall him, is there any such arrangement as that?

A. No. We don't assign a man with any right to recall him. If we do, we sell his contract outright.

Q. So that you can sell a contract and thereby make yourself another spot for your 25 and 37 men, can't you?

A. That's right.

Q. And that is done all the time, isn't it?

A. That is baseball tradition.

Q. Yes. That would be a method whereby the club could take care of its obligations under the reemployment provisions [101] and the League regulations with regard to reemployment and at the same time keep its personnel up in good shape, wouldn't it? That is, they could sell the contract to someone else?

A. Yes.

Q. And dispose of them?

A. Right.

Q. Now, I noticed that Mr. Barisoff played under contract with Hollywood for some several seasons, did he not?

A. That's right.

Q. Prior to the time that he entered the service?

A. Yes.

Q. Well, all during that time in baseball parlance, he would be known as a Hollywood Club man because he was under contract all that time to Hollywood?

A. We kept him around as a prospect.

Q. Well, he was a prospect; he was also under contract to you and you had to see that he got his money?

A. That's right.

Q. Enough of a prospect, at any rate, to cause you to renew the contract from year to year?

A. That's right.

(Testimony of Oscar Reichow)

Q. The same would be true with each of these other men, except with respect to Mr. Knudson?

A. Yes.

Q. Well, how many men could you have under contract [102] and in reserve for a team during the war?

A. During the war?

Q. Yes. A. Forty-two.

Q. Forty-two. And these men were men on the reserve list? A. That's right.

Q. In other words, they were working for Hollywood, or rather they were under contract, Hollywood's reserve contract?

A. While they were in the service?

Q. Well, not in the military service, but I mean before that time when they were out on option to these other clubs? A. That's right.

Q. They were a part at that time of the reserve group? A. Group, correct.

Q. Well, even those men that were on reserve were material at that time to play on Hollywood?

A. No, not necessarily. It depends on their development whether they are put out on option.

Q. It also depends upon the needs of the club, too, doesn't it? A. Sometimes.

Q. In other words, a man may be just as good to play on the Hollywood team when you have him on reserve at some other place because you have got a surplus of that type of [103] that type of player?

A. No. That would depend on a man's ability. If he could run another man out of a job, he could get the job. If you have a better man, you are going to take the better man.

(Testimony of Oscar Reichow)

Q. Yes. A. Correct.

Q. But you have him on reserve because you think you may need him or may have some use for him?

A. We think that he may develop, yes.

Q. Now, during the 1946 season, what was the day that the season started, that the pay of the players started? A. March 29th.

Q. And when did it close?

A. The season officially closed September 22nd.

Q. Was there a play-off—

A. (Interposing) One week of play-off.

Q. What was that play-off?

A. That was the Shaughnessy play-off to finish September 29th.

Q. You had one week to play off?

A. That is all.

Q. What do you mean by that play-off?

A. Well, you mean by the play-off, you have four teams that finish in the first division, and those four teams compete. The first team plays the third team, and the second [104] team plays the fourth team; and the winners then play in the final for the play-off championship.

Q. How did Hollywood come out in that?

A. We finished third in the league race, and we were knocked out in the first week of the play-off.

Q. I see. In organizing the play-off games do the players get some additional money for playing those games? A. They do.

(Testimony of Oscar Reichow)

Q. In the case of Hollywood last year, how much pay-off compensation was paid to your pitchers?

A. That I don't know. You see, the money that they receive for the play-off goes to the players, and they divide it among the team, the players on the team at that time. There might be 25 portions, 20 portions, or there might be 30 portions; and the players vote that themselves because that money that they win for finishing in the first division, the ball club has nothing to do with that.

Q. Do they give that play-off money to the men on reserve? Do they share in it?

A. No, not unless they were on the ball club at that time, active players.

Q. You generally keep up a full complement of 25 players, don't you?

A. Not always.

Q. How many men shared in that play-off money last [105] year?

A. The play-off last year? I think 32, including the ground keepers, the bat boys and the ball boys and everything else.

Q. I see. Do you know how much it was?

A. No, I don't recall what it was.

Q. The total amount that was divided?

A. Beg pardon?

Q. The total amount that was divided.

A. The total amount was \$1250.

Q. Between 32 people?

A. That's right.

Q. There was an additional week's actual salary paid to each one of the players in addition to the play-off money wasn't there?

A. That's right.

(Testimony of Oscar Reichow)

Q. In other words, they draw an additional 7 days' pay? A. That's right.

Q. So that the season for a player on the team continued until September 29th?

A. That's right.

Mr. McCall: I believe that is all. [106]

Redirect Examination

By Mr. Kanne:

Q. You testified that the players were given the increase because of baseball law over their pre-service contract when they came back, is that correct?

A. That is correct.

Q. In the case of Lilly, do you know whether or not that increase was greater than 25 per cent required by the—(pause). A. It was.

Q. Do you know what his pre-war salary was?

A. I think it was \$300 a month.

Q. And was he rehired at \$450?

A. That is correct.

Q. The additional 25 per cent over and above that required by baseball law, was that done in the hopes that the man would develop and be a player worth that amount?

A. That's right.

Q. Now, in the case of Barisoff, do you recall what his pre-war salary was? To refresh your recollection, I believe it has been testified it was \$200.

A. I believe it was \$200, yes.

Q. And he was rehired at \$300?

A. That's right.

(Testimony of Oscar Reichow)

Q. Was the increase there over and above the 25 per [107] cent, or making a total of 50 per cent increase over his pre-war salary: was that done in the hopes that he would develop and perform according to that salary payment? A. That's right.

Q. I don't know whether I should go back to the reserve list and the roster or not, but when you say the reserve list was 37 players, by that do you mean there were 25 men that are on the active Hollywood roster and there are 12 other men that may be out on farmed-out contracts? A. Yes.

Q. During the regular season?

A. During 30 days after our season opens up.

Q. You mean you may then have 37 men that are under contract with the Hollywood Baseball Club?

A. That's right.

Q. During the course of the year through hiring and discharging, that number of 37 may fluctuate so that you may actually have hired 50 men on your payroll during that period of time, at no time there being more than 37, is that correct?

A. We can't have over 37 at any time.

Q. At one time, but during the course of a full season? A. Oh, yes.

Q. You are apt to have many more than the 37, is that correct? A. That's right. [108]

Q. In the normal course of events, what is the average that you may have under contract at any time during the full year, not the amount at one time, but how many have entered into contractual relationships during the whole year? A. During the whole year? Thirty-seven.

(Testimony of Oscar Reichow)

Q. It is 37, the most you can have at one time, and that amount changes as you hire and fire?

A. I see what you mean. We may have 50 or 75, you can't tell. It all depends on how many players we sign and release.

Q. Is there any figure close to 75?

A. I would say 45 to 50.

Q. That is the general average? You hire 45 to 50 at some time during the year?

A. That's right.

Mr. Kanne: That is all.

Recross Examination

By Mr. McCall:

Q. Mr. Reichow, the Seattle-Rainier Baseball Club is a club in the same league as the Hollywood Club?

A. Yes.

Q. That is the same club?

A. Yes.

Q. And that is the club that was involved in the case of Niemiec vs. Seattle? [109]

A. That's right.

Q. And the same league regulations apply to Hollywood as apply to the Seattle-Rainier Club?

A. That's right.

Mr. McCall: That is all.

Mr. Kanne: That is all.

(Witness excused.)

The Court: We will recess for 5 minutes.

(Brief recess.)

The Court: You may proceed.

Mr. Kanne: Mr. Fausett.

ROBERT S. FAUSETT,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert S. Fausett.

The Court: What is the last name?

The Witness: Fausett, F-a-u-s-e-t-t.

Direct Examination

By Mr. Kanne:

Q. Did you occupy a position with the Hollywood Baseball Club in 1946? A. I did.

Q. What was your position? [110]

A. Manager, field manager.

Q. Will you please outline your previous baseball experience?

A. Well, I have played professional baseball for 18 years and with various clubs and managed three years.

Q. Who did you play with?

A. Oh, I played with the Galveston, Texas, League; Indianapolis American Association, Minneapolis American Association, Little Rock, Cincinnati International League and the Hollywood Baseball Club.

Q. Now, will you detail the experience you have had as manager of baseball clubs?

A. I have managed four different clubs. I managed Little Rock in the Southern League and managed the Hollywood one season and most of another, and part of one season of my own club at Albuquerque.

Q. Are you now the manager of a professional baseball club? A. Yes.

(Testimony of Robert S. Fausett)

Q. In the different positions you have held as manager, is one of your duties to select, evaluate players of your club? A. I do.

Q. Do you know each of the petitioners in this case?

A. Yes, I do. [111]

Q. In the year 1946 at the time they have testified being associated with the Hollywood Ball Club, were there periods in which you had an opportunity to observe and examine their play? A. Yes.

Q. Will you tell us approximately what periods of time you did observe the play of Lilly?

A. Well, from spring training up until he was released in May, I believe.

The Court: What year?

The Witness: 1946.

Q. By Mr. Kanne: How long did you have him during spring training?

A. Well, the entire spring training which was around six weeks.

Q. Did you have petitioner Barisoff under your observation? A. Yes.

Q. And how long was he under your observation?

A. During the six weeks spring training.

The Court: What year were these?

The Witness: 1946.

Q. By Mr. Kanne: And petitioner Dawson?

A. Yes, part of spring training in 1946.

Q. I believe it has been testified that Knudson re-[112] turned to the Hollywood Ball Club in about June of 1946. A. That's right.

Q. Did you have an opportunity to observe his performance in play in training? A. In work-outs.

(Testimony of Robert S. Fausett)

Q. Was your observation during those work-outs in your opinion sufficient to form a judgment as to his ability to play baseball? A. I think so.

Q. With respect to each of the other petitioners, do you feel that you had a sufficient opportunity to examine them in spring training or at the times you have testified to to form a judgment as to their ability to play baseball?

A. Yes.

Q. In your opinion did the petitioner Knudson have a sufficient degree of professional skill and ability to allow him to meet the standards of the Hollywood Baseball Club? A. No, I don't think he did.

Q. In your opinion did petitioner Dawson have a degree of professional skill and ability sufficient to equal the standards of the Hollywood Baseball Club?

A. No, I didn't think so.

Q. The same question with respect to petitioner Barissoff? A. Yes. [113]

Q. That is, he did not have that degree of skill and ability? A. That's right.

Q. Did Lilly play on your ball club for a period of time after Williams was injured? A. Yes.

Q. After observing that period of play, as well as the time that you had him in spring training, did you form an opinion as to whether he had the degree of professional skill and ability necessary to play up to the standards of the Hollywood Baseball Club? A. Yes, I did.

Q. What was your opinion?

A. My opinion was he wasn't quite equal to the standards that we was going to try to hold in the Pacific Coast League, the standards of play.

(Testimony of Robert S. Fausett)

Q. Did you discuss these matters with your coach or anyone else associated with the Hollywood Baseball Club?

A. Oh, yes.

Q. After those discussions, and based upon your independent judgment, did you make any recommendations to the business management of the club?

A. Yes, I did.

Q. That the individuals should be released?

A. In my opinion their ability didn't equal that of [114] the men that they were competing with for their particular position?

Q. In each case was this purely a professional judgment or was it based upon any personal feeling that you had towards the individuals?

A. It was based purely on my judgment as to whether they would help our ball club as far as their playing baseball is concerned.

Mr. Kanne: Cross examine.

Cross Examination

By Mr. McCall:

Q. Mr. Fausett, the question was asked you as to whether or not these men possessed the skill and ability equal to the standards of the Hollywood Baseball Club.

Now, what standard do you mean?

A. Well, that is all in our own mind. We have seen different classifications play, and we have built up in our mind a certain standard they must come up to for that particular classification. That is our job to decide that.

Q. And then you said also that in your opinion their ability did not equal that of the men they were competing with for these places?

A. That's right.

(Testimony of Robert S. Fausett)

Q. That actually is what you meant by "the standard"?

What you are trying to do is to pick the best men for [115] the place? A. That's right.

Q. So that what you actually mean was that you had men, that you had them considered for the particular places? A. Yes, sir.

Q. That you thought could play baseball better than them? A. That's right.

Q. And that was actually the standard that you were applying, wasn't it? A. Yes, sir.

Q. With respect to Mr. Barisoff, there is no doubt, is there, that his performance in Bremerton would qualify him for a better place in a better league?

Mr. Kanne: I object to that question, your Honor. Evidence as to what a player may subsequently develop into is not pertinent to determine an honest judgment of fact that was made at the time that he was discharged.

It is granted that there may be cases where judgment may be right or may be wrong, but the evidence that was had before at the time of the discharge would be the only thing that can be considered in making the judgment.

The Court: Sustained.

Q. By Mr. McCall: With respect to Mr. Barisoff, did you consider his qualifications from the standpoint of play- [116] ing right field and at bat?

A. State the question again, please.

Q. Did you consider the qualifications of Mr. Barisoff from the standpoint of playing right field or in the field, and his qualifications to hold down that job from the

(Testimony of Robert S. Fausett)

standpoint of batting? Did you consider him from that standpoint?

A. Well, Mr. Barisoff was pitcher and an outfielder. He had never established any record to any extent as far as playing any other position, as far as I knew. For that reason I probably didn't consider him a prospect for any other position that I was familiar with.

Q. I see. You were not familiar with the fact that he did play back in Anniston primarily in the field?

A. No.

Q. And had a good hitting record back there?

A. No.

Q. Now, as a matter of fact, Mr. Fausett, you were not manager of the club when any of these men formerly were connected with the club, were you?

A. Before they went in the service, no.

Q. You had no information about them prior to that time?

A. No.

Q. And your judgment as to their abilities in relation, in comparison to the other men, was simply that which [117] you obtained from watching them for a time in 1946?

A. I base my judgment on purely what I see and not records.

Q. I see. In other words, what about a batting average of .340? Do you pay any attention to that?

A. Well, we had a ball player last year that hit over .300 in the American League the year before, and he came to our ball club last year and we had to release him. So I base my judgment purely on what they can do while they are with me.

(Testimony of Robert S. Fausett)

Q. I see. So, as a matter of fact, you don't look at the record, do you? A. That's right.

Q. This whole business of picking men to go on the baseball team is a matter of the personal discretion and judgment of the manager, isn't it? A. That's right.

Q. That is what this was based on?

A. That's right.

Q. And you picked the man who would remain on this team and recommended that these men be released because you felt there were other men available to you at the time who had better ability? A. That's right.

Q. At that time? [118] A. That's right.

Q. And that was the sole basis upon which they were released, wasn't it?

A. Yes. It was absolutely the sole basis.

Mr. McCall: That is all.

The Court: Just a minute. Did you give each one of these four men petitioning here while you were there an opportunity and chance to demonstrate their ability to meet the skill that you wanted?

The Witness: I feel I did.

The Court: Did they actually attempt to play?

The Witness: We had exhibition games, your Honor, that we played that we based our judgment on.

The Court: Exhibition games?

The Witness: Yes.

The Court: Did you give them any chance at all in any regular games at all?

The Witness: Well, one of the players after the season opened we retained for some time.

(Testimony of Robert S. Fausett)

The Court: Did they have any record there made that you kept account of as to batting ability or fielding ability? Don't you keep a record of that?

The Witness: Yes, they keep records of them?

The Court: Do you know what the records of these four men were while they were under your observation? [119]

The Witness: No, sir, I don't offhand.

The Court: Does the club have the record?

The Witness: Yes.

The Court: The batting average and fielding? Don't they keep a record of that?

The Witness: Yes, they have a record.

The Court: How many of these four petitioners here when you were there played in actual games after the season commenced?

The Witness: One.

The Court: Who is he?

The Witness: Mr. Lilly.

The Court: How many games did he play?

The Witness: I would guess approximately anywhere from 10 to 15 games.

The Court: And you never used the other three at all?

The Witness: Only in spring training games.

The Court: Just spring training games. But I mean after the season commenced, at the time of the season you never used these other three men at all?

The Witness: No. I formed my opinion before the season ever opened.

The Court: I see. Then, in other words, they just sat on the bench or you farmed them out?

The Witness: Well, we couldn't farm them out. [120]

(Testimony of Robert S. Fausett)

The Court: What did you do with them?

The Witness: Released them.

The Court: Oh! You released them right out, the whole three?

The Witness: Yes.

The Court: How could you determine the batting average or the ability of a ball player in the spring training season? Do you have another training there to keep a record and enough contests to determine whether a ball player could hit a ball or not?

The Witness: Well, we had around six weeks; and in those six weeks we probably played at least 20 exhibition games, what we call exhibition games. We played other clubs in the Coast League and also Major League Clubs and see how they, as we term it, stack up against other clubs in actual ball games.

The Court: When you came to survey all of the players that you had in this club, you thought these four men could not meet the requirements to compete with these other clubs, is that it?

The Witness: That's right.

The Court: You observed that from your actual experience in operating with them during the preparation for the regular season?

The Witness: Yes, sir. That happens to be a manager's job, to decide. You are only allowed to carry so many men, [121] and you have to pick the men that you think will help your ball club the most. Naturally you are going to do that.

The Court: One of these players seemed to have developed to be a ball player after you let him go.

(Testimony of Robert S. Fausett)

The Witness: There is many times that a ball player will develop in a very short time, maybe after some people have given up on him completely; and it is a matter of judgment. I might make mistakes. There might be a lot of ball players that make mistakes.

The Court: I see one of these ball players was farmed out to the New York Giants, the big club, and from there they farmed him out to the Minneapolis Club.

The Witness: That was after we had—

The Court (Interposing): I mean just immediately after you had let him go.

The Witness: He went and established a record in the Class B League, which is a lower classification.

The Court: So you missed him in your judgment?

The Witness: Yes. If he had done that good with us, I wouldn't have made a mistake.

The Court: This record shows he made a pretty good record as a ball player there after that, anyhow. He got in the high class there, and he was hitting—what was it—.345, 40 home runs. Is that not the record?

The Witness: That was three classifications lower than [122] our classification, though.

The Court: Do you expect a man to make more than 40 home runs in a season?

The Witness: I say that is a lower class.

The Court: Would you not consider that good: 40 home runs?

The Witness: Yes, that is very good.

The Court: I played baseball when I was a young fellow, and I considered that pretty good ball playing. I was just wondering whether you missed your guess.

(Testimony of Robert S. Fausett)

This man has a pretty good record so far as a ball player. Counsel says he developed after he was released; immediately after he was released he seems to have become a very good ball player. I am just testing your judgment in his ability at the time you released him. That is what I am trying to get at.

The Witness: Your Honor, I think it will be tested this year. He will be farmed to Minneapolis in an AAA league.

The Court: I cannot say anything about this year. We are trying this lawsuit as to what happened when he was released. That is the law: at the time he was released. His development immediately after might have some bearing as to what his ability was when you released him. He seems to have gone to the top, if I understand this evidence, referring to the first man. [123]

Mr. McCall: Barisoff?

The Court: Yes. It seems that he brought in a lot of runs, and he made 40 home runs and he batted an average of .345. I don't know what else a ball player can do to be a good ball player because when you talk about these old home-runners in the big league, you do not have many of them that make more than 40 in a season.

I am just testing at the time, you know, when he was released.

Mr. Kanne: Yes, your Honor.

The Court: This man's judgment might have unintentionally slipped as to him.

You may have released a man and the next day he goes out and proves to be the top. But the matter is as to what his ability was at the time he was released, within a reasonable time.

(Testimony of Robert S. Fausett)

As to that first man here, it impresses me that he had some ability when he was released as a ball player. I do not know what else he could do.

If I understand the way they keep record of ball players, they write down as to how many runs they make and how many bases they steal, how many fieldings; they keep a record of that nowadays, professional baseball players.

This man came in and testified he had done that. I am not questioning the witness' sincerity, not at all. I am [124] just saying we all do not guess right sometimes.

The Witness: Well, I could have definitely have guessed wrong; but I say still there were three classifications lower, and it doesn't make any difference as to the kind of a player a man is as to what classification he is in because he is competing against better ball players, and there may be better pitchers in a higher league and he wouldn't establish that kind of a record.

The Court: You do not think he would?

The Witness: I don't think he would.

The Court: I am thinking of the judgment of the New York Giants. They must have had some record of this man. They would not pick up anybody around the country.

The Witness: I don't think so. He had a good record the next year, and he might prove just as good as they think he is.

The Court: They send men out to pick the players, as I understand it. That is all.

Mr. McCall: I have one other question, your Honor.

Q. By Mr. McCall: The three other men never did play in any regular games during the season, but Mr. Lilly did play, you say, about 15 games?

(Testimony of Robert S. Fausett)

A. Well, I don't know the exact number.

Q. The man who came in and took the second base job: who was that? [125]

A. Glen Stewart.

Q. And how is it that you came to acquire him, I mean from what club?

A. Because he was with Oakland. I had seen him play for over a year and a half, and liked his baseball playing.

Q. Mr. Lilly was used by the club until you could find someone else to go in that you thought was better?

A. Mr. Lilly, and we had one other fellow we alternated Mr. Lilly with.

Q. And you felt that this other man would be better; and so at the time you acquired him you let Mr. Lilly go?

A. Naturally. We thought he would be better or we never would have acquired him.

Q. As a matter of fact, there was no particular deficiency on the part of Mr. Lilly, but you felt that the other man would fit the place better; that is correct, isn't it?

A. No. As I say, we expected him to come up to certain standards of play, and we thought this other fellow would come up to this standard where we didn't think this particular man would.

Q. Now, after you had supplanted Mr. Lilly with Mr. Stewart, as a matter of fact did the position of the club change materially in the League?

A. I don't recall.

Mr. Kanne: I have a couple of more questions. [126]

Redirect Examination

By Mr. Kanne:

Q. You testified that all of the players, other than Lilly who was with you for a little while, that you made

(Testimony of Robert S. Fausett)

your judgment by seeing them perform in regular league games, is that correct? A. That is correct.

Q. You made your judgment on the exhibition game and spring training with major leagues and other Pacific Coast leagues? A. That's right.

Q. Did you feel at that time that you would be willing to risk playing any of these men in a league game which would count in the won-and-lost column toward your eventual standing?

A. No, I didn't, or I would have retained them.

Q. When Barisoff was in the spring training camp there, did he make any request to you to be tried out or to be considered as an outfielder?

A. I don't believe he did particularly to me. I think maybe he did to someone else connected with the club. I don't know who. Finally word eventually got to me that he wanted to try for outfield, but he never did come to me personally.

Q. He never came to you personally as manager at all [127] to be considered as outfielder?

A. Never at all.

Q. In other words, you based your judgment on his ability as a pitcher? A. That is correct.

Q. That is what you understood he was signed on the ball club as? A. That's right.

Q. Do you happen to know the conditions up at the Bremerton Baseball Park?

A. I have heard. I have never seen the park.

Mr. Kanne: That is all, thank you.

(Witness excused.)

Mr. Kanne: Mr. Thurston.

HOLLIS JOHN THURSTON,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Hollis John Thurston.

The Clerk: T-h-u-r-s-t-o-n?

The Witness: That is correct.

Direct Examination

By Mr. Kanne:

Q. Are you employed by the Hollywood Baseball Association? [128] A. I am.

Q. Were you during the 1946 season?

A. Yes, sir.

Q. What was your position?

A. I am a scout and a coach.

Q. What are the duties of a scout and a coach?

A. Well, to instruct and help the younger players and to try to find ball players who can help our ball club.

Q. Did you play as a professional baseball player?

A. Well, I played with the Chicago White Sox and the St. Louis Browns, Washington Senators and the Brooklyn Dodgers, the San Francisco Seals and the Missions, Seattle.

Q. How long have you been in professional baseball?

A. Thirty-two years.

Q. How long were you in the major league?

A. Nine and a half years.

Q. What positions have you held in baseball other than as a player?

A. Scout for the Pittsburgh Pirates.

(Testimony of Hollis John Thurston)

Q. What were your principal duties as a scout?

A. To buy ball players who I thought could help the Major League Club.

Q. In performing those duties you were required to evaluate and judge and make recommendation on the ability of [129] baseball players? A. That's right.

Q. Do you know each of the petitioners in this case?

A. Yes, I do.

Q. During the course of the 1946 season did you have occasion to observe their ability as baseball players?

A. Yes, sir.

Q. Did you see Lilly during the spring training of that year and up to about May 26th with the Hollywood Ball Club? A. Yes, sir.

Q. Did you see Barisoff during the spring training season? A. Yes, sir.

Q. Did you see Knudson for a period around about June of 1946? A. Yes, sir.

Q. Did you see Dawson during the spring training?

A. Yes, sir.

Q. Do you feel that in each case that you had a sufficient opportunity to observe them playing baseball and in training to form an opinion as to their ability?

A. I do.

Q. Did you form an opinion as to each of their respective abilities? [130] A. Yes.

Q. Do you think that Knudson possessed the degree of skill and ability sufficient to equal the standards of play of the Hollywood Baseball Club? A. I do not.

Mr. McCall: If your Honor please, I want to object to that question. The manager, the playing manager who just left the stand, testified that he did not take into con-

(Testimony of Hollis John Thurston)

sideration any of the records the player may have had of his play. They didn't know anything about the records and that what had to be done, the sole standards that they had were that he, the manager, decided whether in his own mind the man had ability greater than another man.

The Court: This man may have proceeded differently; so let him testify. He is not bound by the other man's testimony.

Mr. McCall: The other man, if your Honor please, was the man who made the decision; and there were no standards he followed.

The Court: Overruled. I think he should answer.

Q. By Mr. Kanne: In your position as coach and scout with the Hollywood Baseball Club did you collaborate with the manager, Mr. Fausett, in the discussion of the ability of baseball players? A. Yes. [131]

A. And you made recommendations as to what you thought of different baseball players?

A. And suggestions.

Q. Going back to the discussion of the degree of skill and ability that was possessed by the respective petitioners, directing your attention to that of Knudson, did you feel during the 1946 season at the time that you observed him that he had the degree of skill and ability sufficient to meet the standards of the Hollywood Baseball Club?

A. No.

Mr. McCall: If your Honor please, I would like first for counsel to specify what he means by "standards."

If we understand standards, then we can talk about something. But this is pure speculation he is talking about.

(Testimony of Hollis John Thurston)

What are the standards of the Hollywood Club? I object to it because there are no standards that he is talking about, that is, that they haven't shown any standards, that there were any standards other than the preference of the manager.

The question calls for something that is speculative entirely, unless he shows that there are some standards that he is talking about.

The Court: So far they have indicated that the standard was to be able to meet opposition.

Mr. McCall: A relative degree between two men, that's right. [132]

The Court: Opposition, as to whether or not a particular man could pitch as well or play right field or second base as well as some other player on a club up here in Frisco or Seattle. That is about what the testimony was.

Mr. McCall: That is correct.

The Court: That is the standard. They wanted to meet competition, as I understood from what some of them said. Unless they have some other way, that is what I gather so far.

Mr. Kanne: That's right, your Honor. I mean to imply that by the term when I use it. That is what I mean.

The Court: They try to meet opposition. That is what the witness said.

Mr. McCall: Your Honor recalls that he said—and here is what he said—that it was his opinion as to their ability, every one of them, that it did not equal that of the men they were competing with for these places.

Now, that is what the last man, Mr. Fausett, said.

(Testimony of Hollis John Thurston)

If that is the standard that this man is going by, I have no objection to it. I say that the mere use of the word "standards," the standards of the Hollywood Club—

The Court (Interposing): Well, he may have some other way to explain "standards" than the other witness. He has a right to say so.

Mr. McCall: If he will specify what standards he is [133] talking about—(pause).

The Court: He just wants to know how you judge to pick these men.

The Witness: In scouting I go through several classifications of leagues, and in scouting for the major league you try to find a boy naturally who will meet the standards of play in the major leagues, and if I am going to buy a ball player for our AA team, I try to find a ball player who will meet the standards of the league that we are going to send him to. We sort of have in our mind the standard of play in each league classification, and it isn't at all by the records.

I bought a ball player with .250 in this league, and he went to the major league and hit over .300 and hit 15 home runs. He won't hit .250 in this league.

I bought a pitcher who won one ball game and lost six, and he went to the major league and won 11.

So it is a standard of play. If he has that physical ability to develop, why, he has a chance to play in the league that he is being sent to. But he must have some natural requirements, naturally. Then he must develop himself if he wants to advance in his play.

Q. By Mr. Kanne: I don't believe we did get an answer to the question that was asked, which was whether or not in your opinion Knudson possessed the degree of

(Testimony of Hollis John Thurston)

skill and ability [134] within the standards of the Hollywood Baseball Club. A. I didn't think so.

Q. Now, I ask you the same question with regard to petitioner Dawson. A. I didn't think so.

Q. And Barisoff?

A. I think he only went to bat a couple of times in spring training, but he came in as a pitcher. I knew him as a pitcher.

Q. You what?

A. I thought he was a pitcher, and he had a bad arm.

Q. You understood that he was a pitcher, is that correct?

A. Yes. And Bill couldn't throw very well. His arm was sore.

Q. Well, with regard to petitioner Lilly, did you feel in your opinion that he did not come up to the degree of skill and ability to meet the standards of the Hollywood Baseball Club? A. I didn't think he did.

Q. Did you observe him during the regular season for a portion of the time? A. Yes.

Q. In your opinion, was his batting up to that standard of the baseball club? [135]

A. No, it was not. I tried to help Lilly. I didn't think he could hit the Coast League pitching with his style of batting, and I tried to help him. I worked with him.

Q. Had you worked with him during spring training on the same point? A. Yes.

Q. Was he able to overcome his difficulty and improve his batting? A. Very little, but some.

Q. But he still did not come up to the standard of the ball club, is that correct? A. I didn't think so.

(Testimony of Hollis John Thurston)

Q. Did you feel in each case that you had sufficient opportunity to observe these players perform to form this judgment?

A. Yes. That is as long as I see most players, longer, in fact.

Q. In your scouting observations do you often make an opinion or a recommendation based upon a lesser period of observation from that which you observed these players?

A. Yes, I have.

Q. Do you feel that there is any definite limit that you are required to observe a player before you can make an honest, and, in your opinion, a satisfactory judgment?

A. Oh, there are times when you are in doubt about a [136] man's ability in one certain department of the game, and you would like to see him against a different style pitcher or otherwise you could see the fellow once and you feel you have seen enough.

Q. Were you in doubt of any of these men at the time they were released?

A. No.

Q. Did you ever have any experience up in the league in which Mr. Barisoff testified that he played after he left the Hollywood Club?

A. Yes. I managed there in the year 1937.

Q. In that same league?

A. Played first base, but they didn't have the talent when he played in the league at that time.

Q. Was that the comparison with the standard of play in that league?

A. Well, it was much lower.

Q. Do you recall what class that was in 1946?

A. It was Class B, the first year the league was organized.

(Testimony of Hollis John Thurston)

Q. I mean what was it in 1946, the year that Barisoff was up there? A. It was Class B.

Mr. Kanne: No further questions. [137]

Cross Examination

By Mr. McCall:

Q. Mr. Thurston, what standards did you use, now, in judging these men?

Well, answer the question: What standards did you use? You say they didn't come up to standards of the Hollywood Club.

Now what standards are you talking about?

A. The standards of the entire league.

Q. What's that?

A. The standards of the entire league.

Q. Now, what standards did you judge them by?

A. It is an AAA league, and I don't think the boys can play AAA baseball.

Q. What is AAA?

A. Well, it is next to the major league.

Q. So playing AAA baseball consists of what?

A. You must be able to run, throw, field and hit.

Q. Each one of these men could run, throw, field and hit, couldn't they?

A. Not well enough, I didn't think.

Q. Well, did you have any figures to show whether they could run, field, throw or hit?

A. I never use figures.

Q. As a matter of fact, it has been testified, both by [138] Mr. Fausett and yourself, that you don't bank on figures in this matter? A. That's right.

(Testimony of Hollis John Thurston)

Q. So, as a matter of fact, there are no standards from the standpoint of averages or anything of that sort that you measure men by?

A. No. You think if he can help you win a ball game, naturally that is what you want.

Q. So the standard that you apply to a man—isn't this correct—is this: that you have a place in mind, and there is one man and another man, and you make an opinion as to whether you think one man or another would best fit in that place?

Now, is that the standard you are talking about? Isn't that it?

A. Well, you have, by their play, naturally form an opinion. You can't form an opinion until you see them both play.

Q. That is correct.

A. Or until you see one play. It makes no difference. If you don't believe a man can play in the league, why, you certainly don't want to carry the man.

Q. Well, by playing in the league you mean that he is either equal to, superior to or lesser than some other particular person that you have in mind? [139]

A. Not necessarily. You may have four men for one position, and possibly there wouldn't be any of the four that can help you win a ball game in the league. You would have to let all four of them go and get another, one that you felt in your own mind could help you.

Q. But there is no standard, no figures that you go by?

A. No, I wouldn't say there are any figures.

Q. Do you have any figures that you applied to these men?

A. No, just by merely watching them play.

(Testimony of Hollis John Thurston)

Q. Spring training is the time when actually the club has a lot of candidates for places on the team?

A. That is right.

Q. And the standards that are applied there that you try to pick out the men who are the best for those particular places—that is correct?

A. That's right.

Q. Now, the man that is the best, that is reported, and assuming you have got a place to fill, you give him that place, don't you?

A. If he can win the job, yes.

Q. Well, assuming he is the best there and you have got to have the place filled; so you hire him? That is what happens?

A. That's right. [140]

Q. So the standard is his comparison with a particular group that has reported for spring training or on the field? Now, that is correct, isn't it?

A. To a certain extent.

Q. In judging these men, I will ask you if this isn't what you thought, and this is what Mr. Fausett finally said that he meant; that he judged that the ability of these men did not equal that of men they were competing with for the places on the team.

That is what you meant, wasn't it?

A. Not exactly. You have to build your ball club up so they will be a competitive team in your league; but regardless of your men, you may have to fire all of them that you have in camp and get 25 new ones.

Q. If you fire them all at once, you have to have somebody play at that place, whether he is good, bad or indifferent?

A. You use him until you get somebody better.

(Testimony of Hollis John Thurston)

Q. What I am trying to get at is the actual standard. These men you let go because you had somebody whose ability you considered to be better than theirs? That is the actual test, isn't it? A. Yes.

Mr. McCall: That is all. [141]

Redirect Examination

By Mr. Kanne:

Q. I would like to go back to the question of standards here again.

You testified that these men did not come up to the standards of the Hollywood Baseball Club, and one time you testified that the standards were those of beating the competition that would be afforded by the other teams in the league; in other words, you judged the man as to whether he could play ball in the Pacific Coast League.

Now, Mr. McCall has asked questions to which your replies have indicated that your judgment might be connected with the relative position of the players alone.

In stating what the standards of the Hollywood Ball Club were, the standards of judging these men, do I understand you to say that you were judging the standards of opposition which might be met from the entire Pacific Coast League?

A. Well, you do. You have to build your club to compete with the other clubs in the league.

(Testimony of Hollis John Thurston)

Q. In other words, you are not just judging between particular individuals on your own ball club who are competing for a job, in seeing whether a man comes up to the standards of the Hollywood Baseball Club? You are seeing whether he can come up to the standards of the other men in the league and can hit and pitch in comparable style with other [142] players, is that right?

A. That's right.

Mr. Kanne: That is all.

Recross Examination

By Mr. McCall:

Q. But you have to take what is there anyhow, don't you?

A. You have to have nine men on the field, when you start the game, yes, sir.

Q. And your actual test is, Who are the best men for the nine?

A. To start the game.

The Court: Is that all of this witness?

Mr. McCall: That is all, your Honor.

The Court: That is all, Mr. Witness. You are excused.

(Witness excused.)

Mr. Kanne: Respondent rests, your Honor.

Mr. McCall: One further question, your Honor. Mr. Dawson, please.

HUBERT L. DAWSON,

recalled as a witness by and on behalf of the government in rebuttal, was examined and testified further as follows:

Direct Examination

By Mr. McCall:

Q. Mr. Dawson, I overlooked asking you, When was it [143] that you took up the matter of your release by the Hollywood Club with the Selective Service System for the purpose of filing a complaint?

A. You mean after I was released? I applied at my local draft board in my home town.

Q. What town is that?

A. Fullerton, California.

Q. How many days after your release?

A. Approximately three or four.

Q. And you have cooperated with them ever since?

A. When I went to Yakima to play up there I had correspondence with them asking them if they had any information whatsoever. They didn't get any information; so I applied at the Yakima Selective Service where I got action.

Q. You have been actively cooperating with them ever since that time?

A. Yes, sir. It has taken that time.

Mr. McCall: That is all.

(Witness excused.)

Mr. McCall: That is our case, your Honor.

The Court: Both sides rest?

Mr. Kanne: Yes, your Honor.

Mr. McCall: Yes, if the court please.

The Court: Well, you may be here tomorrow morning at 10:00 o'clock and argue the case. [144]

Mr. Kanne: Very well, your Honor.

The Court: 10:00 o'clock tomorrow morning we will hear the argument from both sides.

(Whereupon, at 3:55 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., March 7, 1947.)

[Endorsed]: Filed Jul. 29, 1947. [145]

[Endorsed]: No. 11706. United States Circuit Court of Appeals for the Ninth Circuit. William Barisoff, Robert I. Knudson, Hubert L. Dawson, Jr., and Arthur M. Lilly, Appellants, vs. Hollywood Baseball Association, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 12, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11706

WILLIAM BARISOFF, ROBERT I. KNUDSON,
HUBERT L. DAWSON, JR., and ARTHUR M.
LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a cor-
poration, Appellees.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON THE
APPEAL

Come now the appellants, William Barisoff, Robert I. Knudson, Hubert L. Dawson, Jr. and Arthur M. Lilly, and pursuant to Rule 19(6) of this Court, state that the points on which they, and each of them, intend to rely on this appeal are as follows:

1. The District Court erred in dismissing the petitioners and refusing relief to each appellant, under 50 U. S. C. A. App. Secs. 308(e) and 357.

2. The clear weight of the evidence is that each appellant left a position "other than a temporary position" as a baseball player, in the employ of appellee in order to be inducted into the armed forces, within the meaning of Section 8 of the Selective Training and Service Act of 1940, and was reemployed in conformity with said section of said act; and the pleadings, the evidence and the applicable law are insufficient to, and do not support the trial court's finding that petitioners' said positions were temporary.

3. The clear weight of the evidence is that each appellant was "discharged without cause" by the appellee from his restored position as a baseball player in appellee's employ, within one year after his restoration thereto, contrary to the provisions of Section 8(c) of the Selective Training and Service Act of 1940; and the pleadings, the evidence and the applicable law are insufficient to and do not support the District Court's findings that the appellants were not discharged without cause.

4. The clear weight of the evidence is that each appellant suffered a loss of wages by reason of the appellee's unlawful action in discharging him without cause within the year following his reemployment and restoration to his former position in the appellee's employ; and the pleadings, the evidence and the applicable law are insufficient to, and do not support the District Court's findings that none of the appellants suffered any such loss of wages.

5. The clear weight of the evidence is that each appellant was qualified to perform the duties of his position as a baseball player in the appellee's employ, both before and after his service in the armed forces, and that the circumstances of the appellee had not so changed at any time as to make it impossible or unreasonable for the appellee to reemploy and retain each of them in its employ for the statutory year following his restoration to such position; and the pleadings, the evidence and the applicable law are insufficient to, and do not support the District Court's findings that none of the appellants were qualified to perform the duties of their positions in the appellee's employ either before or after his service in the

armed forces, and that the appellee's circumstances had so changed as to make their reemployment, restoration and retention impossible or unreasonable within the meaning of Section 8(b)(B) of the Selective Training and Service Act of 1940.

6. The pleadings, the evidence and the applicable law are insufficient to, and do not support the District Court's findings that any of the appellants waited an unreasonable length of time to commence suit after their unlawful discharges by the appellee and that the appellee was prejudiced by such delay.

7. The trial court erred in failing and refusing to require the appellee to reemploy the appellants Hubert L. Dawson, Jr., and Arthur M. Lilly for that portion of the reemployment year of each that remained unexpired at the time of their unlawful discharge; and in failing and refusing to require the appellee to compensate all four of the appellants for their loss of wages suffered by reason of their unlawful discharges.

Respectfully submitted,

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.

Assistant U. S. Attorney

Attorneys for Appellants

[Endorsed]: Filed Aug. 15, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AS TO EXHIBITS NOS. 1, 2, 3, 5,
6, 8, 9, 10, 11, 13, 14, 15 and 16

Appellants William Barisoff, Robert I. Knudson, Hubert L. Dawson, Jr., and Arthur M. Lilly and Appellee Hollywood Baseball Association, stipulate and agree as follows:

All of the 16 original exhibits were transmitted to the Ninth Circuit Court of Appeals with the record, and are available for inspection in the hands of the Clerk of the Court.

With the exception of Exhibits Nos. 4, 7 and 12, all 16 of the exhibits are Uniform Player's Contracts on printed forms approved by the National Association of Professional Baseball Leagues. The provisions of all of the said contracts are identically the same except as to: (1) the class of the contracting baseball club; (2) the name of the contracting baseball club; (3) the name of the contracting player; (4) the year, or playing season, for which the contract is to be effective; (5) the agreed salary; (6) the date of the signing of the contract; and (7) any extra compensation to be received by the player.

To save printing expense, it is agreed that only Exhibits Nos. 2, 4, 7 and 12 are to be included in the printed record; and that the Exhibits Nos. 1, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 are identical with Exhibit No. 2 in all material respects, save and except that the aforesaid class,

the parties, the playing season, the salary, the date and the extra compensation provisions vary, as between said exhibits, in accordance with the Table of Contracts set out below:

TABLE OF CONTRACTS

<u>Exhibit</u> Number	<u>Club</u> Class	<u>Contracting</u> Ball Club	<u>Contracting</u> Player	<u>Year</u>	<u>Monthly</u> Salary	<u>Date</u>
1	AA	Hollywood	William Barisoff	1942	\$200	3-31-42
2	AAA	"	"	1946	\$300	2-18-46
3*	B	Bremerton	"	1946	\$175	4-24-46
5	AA	Hollywood	Arthur M. Lilly	1943	\$300	4-15-43
6	AAA	"	"	1946	\$450	2-18-46
8*	B	Yakima	"	1946	\$200	6- 7-46
9	AA	Hollywood	Robert I. Knudson	1943	\$200	6-25-43
10	AAA	"	"	1946	\$250	5-29-46
11*	C	Fresno	"	1946	\$150	6- 6-46
13	C	"	"	1946	\$200	8-15-46
14	AA	Hollywood	Hubert L. Dawson, Jr.	1943	\$300	4-15-43
15	AAA	"	"	1946	\$375	4- 1-46
16*	B	Yakima	"	1946	\$200	4-24-46

*See Extension of Table of Contracts Below:

EXTENSION OF TABLE OF CONTRACTS

<u>Exhibit</u> Number	<u>Contracting</u> Parties	<u>Extra Compensation</u> (if any)
3	(Bremerton—Barisoff)	10% of player's sale price
8	(Yakima—Lilly)	\$500
11	(Fresno—Knudson)	\$100 per month from Hollywood
16	(Yakima—Dawson, Jr.)	\$450

By substituting data from the Table of Contracts in "Class" line of the caption, and in the "Parties", "Employment" "Salary", date and "Notice" paragraphs of Exhibit No. 2, all of the terms of all the contracts made Exhibits Nos. 1, 2, 3, 5, 6, 8, 9, 10, 11, 13, 14 and 16 may be ascertained.

This August 14th, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.

Assistant U. S. Attorney

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By Frank J. Kanne, Jr.

Attorneys for Appellee

[Endorsed]: Filed Aug. 18, 1947. Paul P. O'Brien,
Clerk.

No. 11706.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT L.
DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLANTS' BRIEF.

JAMES M. CARTER,
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No. 11706.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT
DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLANTS' BRIEF.

Jurisdiction.

The four appellants, who are honorably discharged veterans of the armed forces, petitioned the District Court of the United States for the Southern District of California, to enforce their reemployment rights as baseball players against the appellee Hollywood Baseball Association, under Section 8 of the Selective Training and Service Act of 1940, as amended [50 U. S. C. A., App., Sec. 303], and Section 7 of the Service Extension Act of 1941, as amended [50 U. S. C. A., App. Sec. 357.] The District Court denied and dismissed the petition, and the veterans appeal. [R. pp. 2-25.]

(The Selective Training and Service Act of 1940, as amended, will be sometimes referred to herein as the "STSA".)

Jurisdiction below rested on STSA, Sec. 8(e) [50 U. S. C. A., App., Sec. 308(e)]; and jurisdiction here, over this appeal, is based on Judicial Code, Sec. 128(a)-First [28 U. S. C. A., Sec. 225(a)-First.]

Statutes Involved.

The statutes involved are 50 U. S. C. A., App., Secs. 308, 316(b), and 357, *i. e.*, Secs. 8 and 16(b) of the STSA, and Sec. 7 of the Service Extension Act aforesaid. Pertinent provisions of these Acts are:

STSA, Sec. 8(a)—(Provides for the issuance of certificates of satisfactory completion of service to persons inducted into the armed forces.)

Sec. 8(b)—“In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year.” . . .

“(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so;”

. . .

. Sec. 8(c)—“Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval

forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.”

Sec. 8(d)—(Not applicable.)

Sec. 8(e)—“In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer’s unlawful action.” . . .

Sec. 16(b)—(Excepts Sec. 8 from the expiration clause, and continues it in effect indefinitely.)

Section 7 of the Service Extension Act extended the benefits of STSA, Sec. 8, *supra*, to “any person who, subsequent to May 1, 1940,” and prior to the termination of hostilities “entered upon active military or naval service in the land or naval forces of the United States.”

Statement of the Case.

While employed under contracts requiring them to play baseball for the appellee Hollywood Baseball Association (herein called "the Club") or its assignees, the appellants William Barisoff, Robert I. Knudson, Hubert L. Dawson and Arthur M. Lilly entered upon active military or naval service in the armed forces of the United States under the STSA in 1942-44. Honorably discharged therefrom in 1945-46, each veteran made timely application for, and was duly reemployed by the Club, at an increased salary, under contract requiring him to play baseball for the Club or its assignee during the year 1946, and giving the Club the right to renew his contract for the year 1947. Shortly afterward, and within one year after being so reemployed, each veteran was "unconditionally released", or discharged; and this suit is based upon such discharges.

At the time of his induction into the armed forces, appellant Lilly was playing on the Club's active team at Hollywood; Dawson was "farmed out" to Memphis, and was playing with that club's team, although under contract to the appellee Club; Barisoff and Knudson were resting between official baseball playing seasons, but were under contract to the Club to report and play baseball for the Club or its assignees during the next year. In the baseball season immediately prior to his induction, Knudson finished the season on the Club's active team; and Barisoff, after playing part of the season on the Club's active team, had been "farmed out" to the Fort Worth club, and finished the season there. All appellants were "under contract" as aforesaid, to the appellee Club, when inducted.

Because he was so under contract, each veteran was, under "baseball law", the "property" or employee of the

Club; and, for this reason, under the rules of the National Association of Professional Baseball Leagues, by which the Club and each player was bound, the Club was obligated and required to restore him to employment, under a uniform player's contract, at an increase of 25% over his former wage, upon his return from the armed forces, under the Association's National Defense Service program. [R. pp. 119-121.]

After being "released" or discharged by the Club in 1946, as aforesaid, each veteran independently secured other employment, but at less pay, with another professional baseball club, and finished the 1946 baseball season with such other club.

During the 1946 season, the veterans lodged complaints with the Selective Service System against their said discharges. The complaints, in due course, were referred to the United States Attorney; and on January 23, 1947, their joint petition in this case was filed by the four veterans through such United States Attorney. Appellants Barisoff and Knudson petitioned the District Court to require the Club to compensate them for their loss of wages suffered by reason of the discharges, during the 1946 baseball season, only. Appellants Dawson and Lilly petitioned for both (1) restoration to employment by the Club, and (2) for their interim loss of wages, as well. [R. pp. 2-6.]

The appellee Club's answer [R. pp. 7-11] interposed, as defenses to the veterans' suit, the six claims that:

(1) Their pre-service positions were "temporary".

(2) The Club's circumstances had so changed as to make their restoration "unreasonable".

(3) They were “not qualified” to play baseball, when reemployed.

(4) They were discharged for “inability to play baseball with skill and ability,” and hence, “for cause.”

(5) They were guilty of laches in filing suit.

(6) And, had suffered “no loss of wages” by reason of the discharges, or a less such loss than is claimed.

The case was tried on March 6, 1947, before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury; and on March 11, 1947, the Court filed a written Opinion [R. pp. 12-15] sustaining the first *two defenses* listed above, to-wit, that the veterans left mere “temporary positions” to enter the armed forces, and that the Club’s circumstances had so changed in their absence as to make their restoration “unreasonable”.

Thereafter, however, on March 25, 1947, the Court approved and filed findings of fact and conclusions of law, prepared by counsel for the Club, *sustaining all six* of the above defenses; and entered judgment dismissing the petition. [R. pp. 16-25.]

Notice of appeal was filed June 23, 1947. [R. p. 25.] On July 31, 1947, orders were entered, extending the time for filing and docketing the appeal; and directing that the original exhibits be transmitted to this Court, without copying, and be returned to the District Court upon the conclusion of the case here. [R. pp. 26-27.] The appeal was thereafter duly perfected. [R. pp. 28-29, 158-164.]

On December 11, 1947, an order was entered in this Court, upon stipulation and affidavit, extending to February 1, 1948, the time for filing this brief.

Stipulation as to Exhibits.

The original exhibits are on file in the office of the Clerk of this Court, for the Court's convenience and inspection. However, the parties, by stipulation [R. pp. 162-164] have prepared and presented a Table of Contracts, the data from which, when read into the appropriate places in the Uniform Players Contract, printed in full in the Record pages 35-49 [Plaintiff's Exhibit No. 2] will enable the Court to reconstruct Plaintiff's Exhibits Nos. 1, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16, without the necessity of referring to the originals filed with the Clerk.

The other exhibits, to-wit, Nos. 4, 7 and 12, are printed in full in the Record at pages 66, 72 and 85.

Conflicting Decisions of District Courts.

Opposing views, as to the reemployment rights of veterans as professional baseball players in the employ of clubs in the Pacific Coast League, are held and applied by District Courts within this Court's appellate jurisdiction. This conflict appears from two reported decisions:

Niemiec v. Seattle-Rainier Baseball Club (D. C., Wash., 1946), 67 F. Supp. 705; and *Barisoff v. Hollywood Baseball Association* (D. C., Calif., 1947), 71 F. Supp. 493, which is the case at bar.

Upon substantially identical facts in all material respects, Judge Lloyd L. Black in the *Niemiec* case held that baseball players are entitled to the reemployment benefits of STSA, Sec. 8; while Judge Cavanah, in this case, held they are not.

Comparison of the two decisions will show that the two judges are at total variance with respect to:

(1) Whether any minor league baseball players, *i. e.*, those hired under the Uniform Player's Contract of the National Association of Professional Baseball Leagues [See R. pp. 35-49, 162-163] held "positions other than temporary" with their respective employing clubs, within the meaning of STSA, Sec. 8(b)?

(2) Whether the 1946 change in the Pacific Coast League's classification, from Class AA to Class AAA, so changed the circumstances of its member clubs as to exempt them from their employer obligations under STSA, Sec. 8, *i. e.*, whether this made it "impossible or unreasonable" for them to restore the returning veterans who left their employ as players while the league was in Class AA?

(3) Whether any actual "standards of performance" existed for players employed by clubs in the Pacific Coast League, before or after the said change in classification; and especially whether there were any such "standards" for players on the Hollywood and Seattle Clubs' teams? (Judge Black found there was "no qualification or standard at all" under the evidence in the *Niemiec* case; and the same is equally true on the proof in the *Barisoff* case.)

(4) Whether a baseball club may be required, under STSA, Sec. 8(e), to rehire and pay a veteran his salary for the statutory year of reemployment (absent facts showing actual disqualification), without also being required to play him in official league games? That is whether, as Judge Black held, the club "need not play him, but it must pay him"? [67 F. Supp. pp. 706 and 708.]

Another point of departure between the two jurists is whether a baseball manager, who discharges a veteran re-employed as a player, must produce *facts* and *evidence* to prove the veteran's disqualification justifying a discharge; or whether the manager's *bare opinion* that another available player is better for his team than the veteran (without considering or offering any performance records showing "disability") is legally sufficient to support a defense of "cause" for the discharge. [Cf. 67 F. Supp. at p. 712 and R. pp. 134-135, 153-155, 146-149.]

In analyzing the *Niemiec* and *Barisoff* decisions, it should be noted that both Clubs involved, *i. e.*, the Seattle Club and the Hollywood Club, are members of the same league, to wit, the Pacific Coast League [R. p. 114, 130]; that the same change in the league's classification was considered in both cases [67 F. Supp. 713; R. pp. 14-15, 22]; that all the players involved in each case were employed under the Uniform Players Contract of the National Association of Professional Baseball Clubs, both before and after their service in the armed forces, and the terms of each of these contracts were identical except as to their names, the years of employment, and amounts of salaries [Cf. 67 F. Supp. at pp. 709-711; and R. pp. 35-49, 162-163]; that the players, in both cases, were reemployed under the National Association's rules respecting National Defense Service [67 F. Supp. at p. 713; and R. pp. 119-121]; that the defenses made by the Hollywood Club in this case were also raised by the Seattle Club in the *Niemiec* case [67 F. Supp. 707 and R. pp. 7-11]; and yet, that, *on the same facts*, the Seattle Club was held *subject* to the STSA reemployment provisions by Judge Black, while the Hollywood Club was held *exempt* therefrom by Judge Cavanah.

The sole pertinent point of difference between the two cases is this:

(1) In the *Niemiec* case, Judge Black held:

"The employer may adopt fair and reasonable standards of qualification for work performance. *Under the evidence there was no qualification or standard at all.* In substance, the most Mr. Skiff (the manager) said was that he had the idea that Mr. Niemiec would not be able to complete the season . . . The employer may discharge at any time for cause, but that cause must be something more than prediction or hunch of a manager. And where the baseball player and the manager disagree as to the actuality of the cause, in fairness and in accord with the American viewpoint, an independent tribunal must have a right *to hear the facts and see whether or not there be cause.*" [67 F. Supp. at p. 712.]

(2) In the *Barisoff* case, on the other hand, Judge Cavanah left the entire matter of whether there was cause for discharge up to the manager's discretion. *No standards whatever, and no performance records were proved by the Hollywood Club, in justification of the discharges of its four veterans.* Nevertheless, Judge Cavanah held:

"Professional ball playing in clubs in a league seems to stand out as *different from ordinary activities*, since regular employment of players must be determined upon their skill and ability to meet the qualifications required of the class and standard of ball in the league, *and that has to be determined by the clubs who employ them, as they are taking the chances of meeting opposition*—and that is recognized when the players apply for employment, for in their contracts with the club they expressly agree

that their services are determinable at any time *at the will of the club*. *It seems that the player has to satisfy the club, the employer, as to his qualifications to continue. Therefore, the statute would not apply* under the evidence in this case when confronted with the exception: 'other than a temporary position' . . . The evidence is undisputed that a higher and greater class and standard of qualifications for players in the Pacific Coast League had developed while the petitioners were not playing, or under the control of respondent, and the statute authorized the respondent to refuse to reemploy the petitioners at the time in question." [R. pp. 14-15.]

Judge Cavanah's finding that a "greater standard of qualification for players . . . had developed" is without evidentiary support. No performance records, and no "standards," either of the league, any club, or any player, were offered in evidence in this case. The Court's inference that a "greater standard had developed" is drawn from the *bare fact* that the clubs in a Class AAA league are permitted to pay their players more money than the clubs in a Class AA league; and presumably, therefore, better players would in the course of time be attracted to the AAA clubs through possible pay increases.

But there was *no evidence* whatever that, either in 1946 or at the time of trial, *any better players had been so attracted* by the change in league classification. The change was first effected in 1946, the year this case arose. [R. p. 114.]

There is no evidence to indicate that, in performance, the Pacific Coast League players, or its Clubs, did any better in 1946 than the same clubs and players did in 1942-1945.

Actually, the veterans in the *Barisoff* case were not discharged because of any “standards of performance”; for players’ performance records, although kept and available to the manager and coach recommending the discharges, were *not even considered* by them, nor by any other official of the Club, in effecting the discharges. [R. pp. 109-112, 133-137, 152-155.] The *actual, and only reason* for the discharges, was stated by Robert S. Fausett, team manager, and Hollis J. Thurston, coach, to be *that there were other men available at the time for places on the Hollywood team whom they felt were better than the veterans.* [R. pp. 137, 155.] Oscar Reichow, business manager of the Club, who actually made the discharges, did so on Fausett’s recommendation; and he testified that he had no independent opinion of his own about the abilities of the discharged veterans. [R. p. 109.] This was the gist of *all testimony* offered by the Club in defense of the discharges.

Specifically, Mr. Fausett testified:

“Q. So, as a matter of fact, you don’t look at the records, do you? A. That’s right.

Q. This whole business of picking men to go on the baseball team is a matter of the personal discretion and judgment of the manager, isn’t it? A. That’s right.

Q. And you picked the men who would remain on the team and recommended that these men be released *because you felt there were other men available to you at the time who had better ability?* A. *That’s right.*

Q. At that time? A. That’s right.

Q. And that was the *sole basis* upon which they were released, wasn't it? A. *Yes. It was absolutely the sole basis.*

Mr. McCall: That is all." [R. p. 137.]

Mr. Fausett's assistant, Mr. Thurston, testified to the same effect as follows:

"Q. Mr. Thurston, what standards did you use, in judging these men? Well, answer the question: What standards did you use? You say they didn't come up to standards of the Hollywood Club. Now what standards are you talking about? A. The standards of the entire league.

Q. What's that? A. The standards of the entire league.

Q. Now, what standards did you judge them by? A. It is an AAA league, and I don't think the boys can play AAA baseball.

Q. What is AAA? A. Well, it is next to the major league.

Q. So playing AAA baseball consists of what? A. You must be able to run, throw, field and hit.

Q. Each one of these men could run, throw, field and hit, couldn't they? A. Not well enough, I didn't think.

Q. Well, did you have any figures to show whether they could run, field, throw or hit? A. *I never use figures.*

Q. As a matter of fact, it has been testified, both by Mr. Fausett and yourself that *you don't bank on figures* in this matter? A. *That's right.*

Q. So, as a matter of fact, *there are no standards from the standpoint of averages or anything of that sort that you measure men by?* A. *No; you think*

if he can help you win a ball game, naturally that is what you want.

Q. So the standard that you apply to a man—isn't this correct—is this: that you have a place in mind, and there is one man and another man, and you make an opinion as to whether you think one man or another would best fit in that place. Now, is that the standard you are talking about? Isn't that it? A. Well, you have, by their play, naturally formed an opinion. You can't form an opinion until you see them both play.

Q. That is correct. A. Or until you see one play. It makes no difference. If you don't believe a man can play in the league, why, you certainly don't want to carry the man.

Q. Well, by playing in the league you mean that he is either equal to, superior to, or lesser than, some other particular person that you have in mind? A. Not necessarily. You may have four men for one position, and possibly there wouldn't be any of the four that can help you win a ball game in the league. You would have to let all four of them go and get another, one that you felt in your own mind could help you.

Q. *But there is no standard, no figure that you go by?* A. *No, I wouldn't say there are any figures.*

Q. Do you have any figures that you applied to these men? A. No, just by merely watching them play.

Q. Spring training is the time when actually the club has a lot of candidates for places on the team? A. That is right.

Q. And the standards that are applied there are that you try to pick out the men who are the best for those particular places—that is correct? A. That's right." [R. pp. 152-154; parenthesis added.]

“Q. What I am trying to get at is the *actual standard*. These men you let go *because you had somebody whose ability you considered to be better than theirs*. That is the *actual test*, isn't it? A. Yes.” [R. pp. 152-155.]

Oscar Reichow, Hollywood business manager, who had no opinion of his own as to whether the veterans were qualified to play baseball, testified as follows:

“Q. Are you familiar with the methods used by professional baseball managers, coaches, in judging players? A. I am.

Q. Do you know whether or not there is any formula or any method of computing statistics or *any standard of that nature* that can be used in judging whether or not the baseball player has the skill and ability— A. (Interposing) *No, there is no particular formula that they use; and they don't rely on statistics* of what a player did the previous year. When they take a man into spring training they give him a lot of instruction as to how to play, how to hit and how to run and do a lot of things; and they watch him carefully, and they form their own judgment that the ball player just doesn't have the ability to remain on the ball club. It is their judgment.

Q. In other words, whether a ball player is retained, a new one is hired or whether they are released is *dependant upon the judgment of the coach or manager or a combination of both*, based upon their experience in evaluating the worth of players? A. *That's right*.

Q. Is any definite period of time of observation necessary to arrive at such a judgment? A. I don't think so. Sometimes you can take a look at a ball

player for two or three days and decide that he is not going to do you any good."

The facts so testified to are perfectly described by Judge Black's statement in the *Niemiec* case, to wit:

"Under the evidence there was no qualification or standard at all . . . And where the baseball player and the manager disagree as to the actuality of the cause, in fairness and in accord with the American viewpoint, an independent tribunal must have a right to *hear the facts* and to see whether or not there be *cause*. To allow the employer to decide that there will be cause in the future to discharge the employee presently is a far cry from the sportsmanship Americans the country over expect from baseball." [67 F. Supp. 712.]

The following rule from *Kay v. General Cable Corp.* (C. C. A. 3, 1944), 144 F. (2d) 653, at pages 655-656, is peculiarly pertinent here, to wit:

" . . . 'Unreasonable' means more than inconvenient or undesirable. The defendant's argument upon this point, if carried to its necessary conclusion, would defeat the main purpose of the Act and limit its operation to merely capricious or arbitrary refusals. Men and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonging absence, *such competition is not part of a fair and just system*, and the intention was to eliminate it as far as reasonably possible. The Act intends that the employee should be restored

to his position even though he had been temporarily replaced by a substitute who has been able, either by greater efficiency or a more acceptable personality, to make it desirable for the employer to make the change a permanent one.”

A burden of unequal and unjust competition was thus imposed by the appellee Club on its returning veterans, unless professional baseball is totally exempt from all reemployment duties to returning veterans, and in a category different from all other American industries, which was what Judge Cavanah held. [R. p. 14.] Yet, Judge Black said in the *Niemiec* case:

“I recognize the seriousness to baseball of having the judge dictate as to its players. But since it has been argued—and correctly—that baseball is the American game, certainly, then baseball ought to bear its share of any burden in being fair to service men. There are few institutions in American life which ought to feel a greater obligation. If Mr. Niemiec and all the others had failed in their job, there would be no American manager of any baseball if such should be played at the stadium this year. If the Nazis permitted baseball, it would not be an exhibition that any of us liked.”

There is thus a direct and irreconcilable *legal conflict* between the *Niemiec* and the *Barisoff* cases, which merits consideration by this Court. We submit that Judge Black was right, and Judge Cavanah in error, on the above points.

Questions Involved.

The following questions are here involved:

1. Whether a baseball player hired under the terms of the Uniform Player's Contract of the National Association of Professional Baseball Leagues held a "temporary position", and was thus excluded from the coverage of the reemployment rights conferred by STSA, Sec. 8?

2. Whether the Pacific Coast League's 1946 change in classification, from a Class AA to a Class AAA league, rendered it "impossible or unreasonable" under STSA, Sec. 8(b), for its member clubs to restore their players to employment upon their return from the armed forces, *i. e.*, whether such change exempted such clubs from all reemployment obligation to returning veterans?

3. Whether there are any legal "standards or qualifications" for players employed by the Hollywood Club (or other Pacific Coast League teams) sufficient to justify a reemployed veteran's discharge, except for proved ineptness; and whether there is any evidence that the appellants were inept, or were not "qualified", or did not meet such "standards or qualifications" for baseball players, if any existed?

4. Whether, after the expiration of the reemployment year, a court may order an unlawfully discharged veteran restored to employment for the period of his reemployment year that remained unexpired when he was discharged, with compensation for his interim loss of wages, under STSA, Sec. 8(e)?

5. Whether the District Court erred in permitting witnesses called by the appellee Club to testify that, in their opinions, the veterans did not meet the "standards" of the Hollywood Club or Pacific Coast League, when no such standards or qualifications were proved, and no performance facts were given in evidence tending to show whether they met such "standards or qualifications"?

The Facts.

The ordinary incidents of baseball games are matters of common knowledge, of which the Court will take judicial notice. Therefore, no explanation is necessary of the terms "home run", "pitcher", "second base", "short-stop", "right fielder", "batting average", "runs brought in", and the like.

Baseball is played by professional, semi-professional, and amateur teams.

Professional baseball is "organized" baseball, *i. e.*, it is a business for profit engaged in by clubs which hire teams of players and exhibit them for public entertainment in games to which admission fees are charged. The owning clubs are organized into leagues of eight clubs each; and the teams employed by the clubs in each league engage annually in a series of officially scheduled games for the league's "pennant" for that year. Generally, no more than one club is "franchised" or located in any one town; and, in this brief, whenever the name of a town appears without state designation, it refers to the professional baseball club located in that town.

The club and the team are entirely separate entities. Players generally have no interest in the clubs by which they are hired.

Leagues, to which the clubs belong, are known as "major" and "minor". The major leagues are the American League of Professional Baseball Clubs, and the National League of Professional Baseball Clubs. The minor leagues, and their member clubs, are members of the National Association of Professional Baseball Leagues (referred to hereinafter as "the Association"), which is a

trade association through and under which various aspects of the business of the minor league clubs is regulated.

There are regulations extending over the entire field of organized baseball known as the Major-Minor League Rules, and the National Association Agreement, by which the clubs and leagues are bound, and the terms of which are enforced upon the clubs and on the players employed by the clubs. [R. p. 36.] These agreements and rules, the Association's rules and regulations, and the constitution and by-laws of the leagues constitute "baseball law", so referred to at pages 119-121 of the Record.

Compliance with "baseball law" is enforced by fines, suspensions, and discharges or expulsions, both clubs and players being subject to these sanctions at the hands of the commissioner, executive committee and president of the Association.

For purposes of control and regulation, the Association classifies its leagues as Class AAA, AA, A, B, C and D. One of the principal points of distinction between the classes is that, in the order listed, the total amount of money which a member club of a league may pay its quota of players decreases according to its league's classification. Thus a club in a Class AAA league may pay its players more money than a Class AA league club. [R. pp. 105, 114.] Top money, of course, is paid in the major leagues.

Minor league clubs, *i. e.*, Association members, are forbidden to employ any player except upon, and in compliance with, the Association's Uniform Player's Contract, a copy of which is set out in full at R. pp. 35-49.

The number of players a club may have under contract at any given time is limited by baseball law. During the

official baseball playing season, a club employs an "active team" and may hold a certain number of other players in "reserve," *i. e.*, "farmed out" or "optioned" to other clubs. Between official baseball seasons, all players who are under contract to the club, whether used on the active team or held in reserve, revert to a common status as players "owned," *i. e.*, players whose contracts to play baseball are held, by the club.

During hostilities in the last war, a club was permitted to have thirty players on its active team, and twelve players in reserve, or a total of forty-two players under contract at one time. Beginning with the 1946 season, the permitted number of players was reduced to twenty-five on the active team, and twelve in reserve, or a total of thirty-seven at any one time. [R. pp. 115-118, 125, 129-130.]

Since a team of nine players is all that can be used on a baseball diamond at one time, the number of "active team" players so allowed is sufficient to enable the club to carry two players for every diamond position, together with extra pitchers and utility men. Obviously, only a few of the players on the active team are, or could be, regular first-string, or star performers; and there are numerous places on every team for ordinary or mediocre players. Also, twelve other players in reserve may be held under contract, playing with other teams.

It is unreasonable to say, therefore, that merely because a player is mediocre, there can be no place for him in the employ of a Class AAA league club. There are literally thousands of baseball players, "workmen" of ordinary or mediocre skill, carried on the payrolls of good and competent baseball clubs. All baseball players can't be stars. The vast majority of players are workmen of ordinary, non-

stellar ability, who are worthy of their hire, and essential to every team and to the business of every club; and yet, who do not excel competing players in skill, in the opinion of team managers.

The Court knows this to be true, on the basis of mathematics, without any proof to that effect.

Prior to the opening of the annual baseball playing season, the clubs conduct spring training to which all players under contract must report and practice for about a month. However, they are not paid for this period of work. The team managers select their active players at these spring training sessions. *An active team of twenty-five or under* is then selected; and the club must dispose of its *reserve players* by farming them out within *thirty* days after the official playing season starts. [R. pp. 118, 119, 129.]

To cut the number of players to its permitted quotas, the club manager may “sell”, “option”, “farm out”, or “release” players.

To sell a player means to completely assign his contract to another club, the latter taking all the rights and obligations of the assigning club thereunder. Frequently, preliminary to a proposed sale, a player is “optioned” to another club for a trial period. In “farming out” a player, he is temporarily assigned to play with another club of lower league class. A player is “released” by terminating his contract.

The Uniform Player’s Contract [R. pp. 35-49] is a written agreement of employment, terminable at will by the club or its assignee (but not by the player), under which the player agrees to render “skilled service as a baseball player in connection with all games” during a desig-

nated calendar year for a stated monthly salary, to be paid only during the club's "scheduled playing season", *i. e.*, not during spring training; and agrees to play for any assignee of the contract at the salary rate "usually paid to other players of like ability" by such assignee; and agrees that the club or its assignee, by notice on or before March 1 of the following year, may renew the contract for that year, at such salary, however, as may be fixed by agreement, *or by the club*, or by decision of the commissioner or Association executive committee, the salary rate so fixed *by the club* to apply until such decision is reached. A player cannot play in professional baseball pending appeal as to his salary rate, unless he accepts such salary as the club may offer, and plays for it or its assignee. [R. p. 122.] The player also agrees to be bound by the Association's regulations printed on the contract and "such reasonable modifications of them" as the club or the Association may announce from time to time; and that the contract "shall not be valid or effective unless and until approved" by the Association's president. [R. pp. 35-43.]

The contract also provided:

"11. This contract is subject to Federal or State legislation, regulations, executive or other official orders, or other governmental action, now or hereafter in effect, respecting military, naval, air or other governmental service, which may, directly or indirectly, affect the Player, the Club or the League; and subject also to all rules, regulations, decisions or other action by the National Association, the League, the Commissioner, the President of the National Association, the Major-Minor League Advisory Council, or the League President, including the right of the Commissioner or the President of the National Association to suspend the operation of this contract during any national emergency."

The club and player further agree, under the contract, that each will be subject to "discipline by the Commissioner or Executive Committee" for "making any agreement" between them "not embodied in the contract"; that the playing season will be fixed by the League each year; that the player must keep himself in first-class physical condition, and submit when requested to a complete physical examination at the club's expense; that the club will provide for the players' travel and maintenance expenses when away from the city of the home town of the club; that the player will report for spring training lasting not exceeding 38 days, subject to fine for failing to report, and will practice without salary for the period, although with expenses paid; and that he will not assert any claim "against any person or organization in professional baseball", except through league and Association officials. [R. pp. 35, 45-48.]

The player also agrees, under the Uniform Player's Contract, that "while under contract or reservation" to the club, "he will not play baseball otherwise than for the club or for such other clubs as may become assignees of this contract in conformity with said agreement"; that he will not engage in professional boxing or wrestling; and that, except with the written consent of the club or its assignee he will not engage in any game or exhibition of football, basketball, hockey or other athletic sport"; that "while under contract or reservation, he will not play in any post season baseball game except in conformity with the National Association Agreement and the Major-Minor League Rules and that he will not play in any such baseball games after October 31st of any year until the following spring training season, or with or against any ineligible player, or team." [R. pp. 38-39.]

The same uniform contract has been used in all minor leagues since 1942. [R. pp. 162-163.]

Under the National Defense Service program of the Association, when a player under contract to a minor league club was inducted into the armed forces during the war, his contract was suspended, and he was placed by W. G. Bramham, president of the Association, on the Association's National Defense Roster as a player leaving the service of such club. Upon returning from the armed forces, such player was entitled to be "reinstated" in the employ of that club, at a salary increase of 25% over his prior contract, by the Association president, under a new contract with the club for the current season on the uniform contract form. [R. pp. 119-121.]

All four of the appellants were so reinstated; except that in the cases of Barisoff and Lilly, their new contracts called for salaries 50% above their pre-induction pay rates, rather than 25%. [R. p. 163.]

The facts in the case of each veteran are as follows:

WILLIAM BARISOFF.

William Barisoff, 25 years of age, began playing professional baseball in 1940, at the age of 18. In that year, he was put under contract by appellee Hollywood Baseball Association at \$150.00 per month, and optioned to the Salinas (Kansas) Club in a Class C league. [R. pp. 30, 31, 57.] Hollywood renewed his contract in 1941 and farmed him out, first to San Bernardino, another Class C. Club; and then to Santa Barbara, a team of like class. [R. pp. 31, 57.] His contract was again renewed by Hollywood in 1942 and he was farmed out to the Anniston (Ala.) Club in the Southeastern League (Class B), where

he played a month and was then called back to Hollywood. He was a regular on the teams of the clubs to which he had been optioned or farmed out, and played in a large number of their games.

After being recalled to Hollywood he played in a few games, and was then farmed out to Fort Worth for the balance of the 1942 season, which he completed there.

In Hollywood, he played as both pitcher and outfielder as he had done for the other clubs, except that in Fort Worth he was principally an outfielder. [R. pp. 31, 32.]

In November, 1942, he was inducted into the Navy after the close of the baseball season. He was then still under contract to Hollywood (Class AA) at a salary of \$200 per month; and under the contract, was required to renew it for 1943, unless released by Hollywood. [Petitioners' Exhibit No. 1, R. pp. 33, 163.]

Barisoff remained in the Navy three years. He played on service teams in two of these years. In 1943, he pitched and played outfielder for the San Diego Naval Training Station team; and in 1944, with the Camp Endicott (R. I.) Sea Bee Base team. In 1945, he was overseas and did not play baseball. He was honorably discharged December 7, 1945, and in the same month applied to Hollywood for reemployment.

Under baseball law, he was entitled to restoration at a salary increase of 25%, or \$250.00 per month, for the 1946 season. However, on February 18, 1946, Hollywood, then a Class AAA league team, placed him under contract for 1946 at \$300.00 per month. [R. pp. 34, 35, 50; Plaintiffs' Exhibit No. 2, R. pp. 35-49.] He was ordered to report and did report for spring training with

the Hollywood team at Ontario, Calif., for about six weeks, without pay. [R. p. 50.]

Hollywood's official 1946 season as a member of the Pacific Coast League, opened March 29, 1946.

Three days before the season started, to wit, on March 26, 1946, Robert S. Fausett, manager of the Hollywood team, told Barisoff that he was "unconditionally released." [R. pp. 50-51.] Barisoff had played only in spring training practice games. [R. pp. 51, 132, 135, 144.]

Fausett was a new manager at Hollywood, not familiar with the previous performance record and experience of Barisoff. He had no information about *any of the appellees* prior to their military service. He formed his opinion as to their abilities solely from what he was able to observe in the 1946 spring training. [R. pp. 135-136.] He did not even consider their performance records in 1946 spring training, although such records were kept. [R. pp. 136-140.] The sole reason he released them, he testified, was because *other players were available whom he considered better*. [R. p. 137.]

After his release, Barisoff was paid \$150.00 as compensation for two weeks of employment.

On April 24, 1946, Barisoff was put under contract by Bremerton, a Class B club, at \$175.00 per month, with a provision that he would receive 10% of the sale price of his contract, if sold. [Petitioners' Exhibit No. 3, R. pp. 53 and 163.]

Beginning with the opening of the Bremerton season on April 26, 1946, Barisoff played regularly with the club throughout the season, participating in 131 games. He first played as a pitcher, but was thereafter used as a regu-

lar right fielder and batter. His fielding record was good and his batting outstanding. He hit .340 for the season; made 40 home runs, *setting a new home run record for the league*, which had previously been 37; and made 18 triple base hits, *establishing a new league record* over the former 17. He drove in 155 runs by reason of his batting. The .340 batting average means that he got a one-base hit or better on approximately every third time at bat. [R. pp. 54-55.]

After the close of the season, on September 8, 1946, Bremerton optioned Barisoff to the New York Giants, a major league baseball club, for \$12,000.00, \$4,000.00 down and the remaining \$8,000.00 to be paid on taking up the option, after a 30-day test with the Minneapolis club, a Class AA league team, similar in rating to that of the Pacific Coast League. [R. pp. 56, 58.] Barisoff received \$400.00 as his 10% on the \$4,000.00 paid by the New York Giants, under the above "bonus" clause of his Bremerton contract.

Barisoff received a total of \$787.50 from Bremerton as his salary at \$175.00 per month from April 26 to September 8, 1946, and the \$400.00 share of the 1947 option money paid by the New York Giants. [R. pp. 56-58.] The Hollywood playing season extended from March 29, 1946, to September 29, 1946, a total of six months, for which, if he had not been discharged, he would have been paid \$1,650.00 in addition to the \$150.00 two week's release payment, or a total of \$1,800.00.

His loss of wages for the season was thus \$862.50, not deducting his \$400.00 share of the option money.

In August, 1946, Barisoff complained to the Selective Service System regarding his discharge by Hollywood; and

he thereafter cooperated with that System, in Seattle and Los Angeles, and with the U. S. Attorney's Office in Los Angeles, until a suit on his behalf was filed by the U. S. Attorney, January 23, 1947. At the time of the trial, March 6, 1947, he was planning to report to Minneapolis for the 30-day trial provided for in the Giant's option. [R. pp. 56-60.]

Mr. Fausett admitted he *might have been wrong* in his estimate of Barisoff's qualifications; but he and the coach were permitted to testify that "in their opinion" at spring training he did not possess skill up to the "standards of the Hollywood Club." Mr. Reichow had no personal opinion. [R. pp. 106, 124-125, 132, 135, 144, 146, 150.]

ARTHUR M. LILLY.

Arthur M. Lilly, 29 years of age, began playing professional baseball with Beaumont, in the Texas League (Class A-1) in 1939, as a second baseman. In 1941, he played shortstop and second base for Texarkana in the Cotton States League; and in the spring of 1942 was put under contract by Hollywood and optioned to Tacoma, in the Western International League (Class B). [R. pp. 59-62.]

During the 1943 season he was put under contract by Hollywood, at a salary of \$300 per month; and *played as a regular first string player on its active team* until he was inducted into the Army on July 9, 1943. [R. pp. 62-63, 67, 163 and Ex. 5.]

After his induction, and in 1943 and 1944, Lilly played with Army baseball teams, to wit, with the Sixth Ferrying Group team in 1943, and with a service team stationed at Long Beach, Calif., in 1944. In 1945, he was

attached to an entertainment unit, and was sent overseas to play baseball with a service team, the majority of which was composed of former major league players, *i. e.*, those who played on teams rated higher than Class AAA. [R. pp. 62-64.]

Honorably discharged from the Army on January 9, 1946, he telephoned Mr. Reichow, Hollywood's business manager, and was advised to communicate with W. G. Bramham, the Association's president and "minor league czar", who wrote him on January 18, 1946:

"I am reinstating you to the active list of the Hollywood Club." [R. pp. 64-66, Exhibit 4.]

Pursuant thereto, on February 18, 1946, he was again put under contract by Hollywood at \$450 per month. He attended 1946 spring training, and no complaints were made about his work. [R. pp. 67-68, 163; Exhibit 6.] He played with the active Hollywood team from the opening of the season, March 29, 1946, until May 26, 1946, when he was "unconditionally released", or discharged. [R. pp. 68, 73; Exhibit 7.]

At the beginning of the season, Mr. Reichow talked to him about sending him to the Birmingham club; but after some delay, Mr. Reichow told Lilly they were going to keep him on the Hollywood team and not farm him out. [R. p. 69.] Lilly played second base for Hollywood in a series of games with San Diego which his team won. He said his performance was fair. Thereafter, he played as a utility man, pinch hitting and as a relief player, until Woody Williams, the regular second baseman, broke his leg, and Lilly was used regularly thereafter as second baseman in several series of games, until another second base-

man was secured. He was then dropped back to utility for a month and then released. Lilly thought he was playing better baseball than in 1943. [R. pp. 70-73; Exhibit 7.]

On June 7, 1946, Lilly was employed by the Yakima Club (Class B) at a salary of \$200 per month (250 per month reduction below his Hollywood salary), with a \$500 "bonus for signing." This contract was on the Uniform Player's Contract form, and required him to renew the contract with Yakima for 1947 also. [R. pp. 74-75, 163; Ex. 8.]

Lilly complained to the Selective Service System about his discharge by Hollywood in June, 1946, and cooperated with the System and the U. S. Attorney's office in their negotiations with Hollywood, which, proving unsuccessful, resulted in the filing of this suit. [R. pp. 75-76.]

After his discharge on May 26, 1946, Lilly earned \$660 salary from Yakima (June 7-Sept. 8 at \$200 per month), but would have earned \$1,290 (May 26-Sept. 29 at \$450 per month) if he had not been discharged by Hollywood. His loss of wage was therefore \$630, without deducting the \$500 "bonus for signing." [R. pp. 72-77.]

After the close of the official baseball season, Lilly played with Hermosillo, a semi-professional team, in Mexico, at \$450 per month from October 16, 1946, until February 18, 1947, and thus received \$1800 *for post-season work*.

His post-season earnings are not deductible in computing Lilly's loss of wages, because they were not made during any time when, if his contract with Hollywood had

remained in effect, he would have been at work playing baseball for Hollywood. As Hollywood had itself released Lilly from the contract, he had a right to utilize this *surplus time* for his own benefit, and Hollywood certainly has no right to complain, nor to derive a benefit, or wind-fall, from the post-season work.

The above comment is made on the premise that the post-season work might be viewed as contrary to the terms of the Hollywood contract, if it had been in effect. Actually, the evidence does not show that his post-season work was in conflict with Sec. 4(b) of the Uniform Players Contract. [R. p. 39.] And, not knowing whether there is any such conflict, we do not concede that there was.

However, what we mean to point out is simply this:

Regardless of the meaning of the contract, Hollywood has no right to claim the benefit of these post-season earnings, in reduction of Lilly's loss of wages during the preceding Pacific Coast League season.

The testimony on which Hollywood relied to show that Lilly was not "qualified" appears at pages 107, 112, 114-115, 124-125, 132, 142, 146 and 150. Other than the bare "opinions" of Fausett and Thurston that another *better player* was available to them, there are no facts in this testimony to show that he was not "qualified" to play for Hollywood, or gave "cause" for discharge. The generalization that, in their opinion, he did not meet the nebulous "standards of the Hollywood Club," we submit, is incompetent; and of no evidentiary weight.

HUBERT L. DAWSON.

Hubert L. Dawson, 26 years of age, began playing professional baseball as a third baseman for the Olean (N. Y.) Club, and in that year played also with Santa Barbara. This was in Class C and D leagues. At spring training, in 1943, he was put under contract by Hollywood, at \$300 per month, and was used about five times as a pinch hitter on the Hollywood active team, until he was optioned to the Memphis (Tenn.) Club (Class A-1), in a class then next below the Pacific Coast League (Class AA). He played on the Memphis team until he entered the Marine Corps on June 24, 1943. [R. pp. 91-94, 163; Ex. 14.]

During the next two and a half years, *i. e.*, 1943-1945, he was busy fighting with the Marines, and did not play baseball. [R. p. 93.] He was placed on terminal leave April 6, 1946, and was honorably discharged April 20, 1946.

On April 1, 1946, he applied for reemployment, and signed a contract with Hollywood to play baseball at \$375 per month in 1946. Before signing, he was told by Mr. Reichow and Mr. Fausett, that he was going to be released immediately, and that he was "not in the plans" for the team. He was released on April 14, 1946. [R. pp. 95-96.] On April 24, 1946, he signed with Yakima (the same team as that on which Lilly played) at \$200 per month and a bonus of \$450 "for signing." This constituted a reduction in pay of \$175 per month under what Hollywood was to pay him. [R. pp. 96, 163; Ex. 16.]

The Yakima season started April 26, 1946. Dawson played in 143 games for the club in 1946, at shortstop and second base. He batted .262, and drove in 130 runs for the season, which gave him a standing *second from top*

in the league for the year. Before the trial, he had been offered by Yakima a 1947 contract at \$300 per month. [R. p. 97.]

Dawson had no other earnings from baseball in 1946, and suffered a \$676.50 loss of wages by reason of his discharge by Hollywood as follows:

Earnings: Received from Hollywood, \$187.50; from Yakima \$1,396; total \$1,583.50. He would have made \$2,240 at Hollywood (six months at \$375 per month). Loss: \$676.50, without considering the \$450 "bonus for signing."

The testimony on which Hollywood relied to show that Dawson was not "qualified" appears at pages 106, 124-125 and 147-150 of the Record. Aside from incompetent "opinions" based on the nebulous phrase "standards of the Hollywood Club," this testimony contains nothing to show that Dawson was not "qualified to perform the duties of his former position" with the Club, *i. e.*, that of a farmed out reserve.

Dawson complained to the Selective Service System about the discharge by Hollywood within three or four days after it occurred, and actively cooperated with the System in seeking relief thereafter. [R. p. 157.]

ROBERT I. KNUDSON.

Robert I. Knudson, 21 years of age, began playing professional baseball with Hollywood in 1943, when he was 18 years old. In that year, he was a star pitcher on a high school team, until the close of school in June; and was then put under contract by Hollywood at \$200 per month, and played with the active team as a "rookie" pitcher from June until the end of the season 1943. He pitched in six or seven games during that time. His con-

tract was the usual Uniform Players Contract, and he was required thereunder to play for Hollywood in 1944, if it wished. [R. pp. 80-82, 163; Ex. 9.]

In February, 1944, he entered upon active duty in the Army, and did not play baseball during his army service. He was honorably discharged May 5, 1946, after the start of the Hollywood playing season.

He applied for reemployment and on May 29, 1946, was put under contract by Hollywood at \$250 per month, pursuant to the National Defense List program, and was immediately optioned to Fresno (Class C), without having worked with the Hollywood team at all. [R. p. 83.]

Fresno gave him a contract, dated June 6, 1946, for \$150 per month, and Hollywood paid the difference of \$100 per month between that salary and the salary called for by the Hollywood contract. [R. pp. 83-84, 163; Ex. 10, 11.] This arrangement continued from June 1, 1946, until June 29, 1946, when he was simultaneously released, or discharged, by both Fresno and Hollywood. [R. p. 83; Ex. 12.] No cause for the release was given by Fresno, nor proved at the trial. Hollywood released him because of the Fresno release.

Knudson remained idle for two weeks, and was then recalled by Fresno and given a new Fresno contract for \$200 per month dated August 15, 1946, under which he played with that team until the close of its season on September 2, 1946. Hollywood made no payments to him after his July 29, 1946, release. [R. pp. 85-86, 163; Ex. 13.]

It was necessary for Knudson to have training in order to pitch well, and Hollywood gave him no practice or training after his return from the army. He had pitched

in five games, winning one, when he was released; and he played in about seven games during the season. [R. p. 87.] After the close of the season, he began attending school, and practicing pitching. At the time of trial he was in better pitching condition than during the preceding summer.

Knudson complained of his release to the Selective Service System about two weeks after it occurred; and that System and the U. S. Attorney's office processed his complaint thereafter to the time of trial.

Knudson's loss of wages due to his discharge was as follows:

Unemployed from his release (July 29) until he was rehired by Fresno (Aug. 15), making a 16-day loss at \$250 per month, or \$125; plus the difference between \$250 and \$200 per month from August 15, until September 2, the end of the Fresno season, or \$25; plus loss at \$250 per month for the 27 days, September 2, to September 29, the end of the Hollywood season, or \$224.91. Total loss \$374.91.

Knudson had returned from the army in the middle of 1946 season, and without playing or practicing with Hollywood, was immediately optioned to Fresno. As no witness for the Club saw him play, and they never studied records, there was no competent evidence that he was not "qualified" for his former job as "rookie pitcher" with the Hollywood Club.

Obviously, he was never given a chance with the Hollywood Club in 1946, and is entitled to the loss of wages he claims. There is nothing to the Club's testimony as to Knudson [R. pp. 106, 133, 147-150], avoiding this conclusion.

Specification of Errors.

I.

The evidence does not support, and the District Court erred in making, any of the following findings of fact and conclusions of law, to-wit:

(a) That when the veterans applied for reemployment, they were not “qualified to perform the duties of their former positions” with the Club. [R. pp. 17, 22.]

(b) That they were “discharged for cause, to-wit, the lack of skill and ability to play baseball according to the standards of the Hollywood Club.” [R. pp. 18, 23.]

(c) That they have not, by reason of their discharges, “suffered a loss of wages in any amount, or at all” [R. p. 18]; and “will not suffer any future loss of wages.” [R. p. 19.]

(d) That their increased salaries, upon reemployment were “based upon the right and privilege of respondent (Club) to terminate each such employment.” [R. p. 20.]

(e) That their pre-induction positions in the Club’s employ were “temporary” within the meaning of STSA, Sec. 8(b) [R. pp. 21, 12-15]; and they were “hired as temporary players,” and none of them ever “developed sufficient skill and ability as baseball players to earn positions on” the Club’s team. [R. pp. 22, 12-15.]

(f) That the Club’s “circumstances have so changed as to make it unreasonable to require the restoration” of the veterans to positions of employ-

ment, due to the change in the classification of the Pacific Coast League to Class AAA. [R. pp. 22, 12-15.]

(g) That the veterans “waited an unreasonable length of time” to sue, thereby “prejudicing” the Club. [R. p. 23.]

II.

The District Court erred in failing to hold that by re-employing the veterans, pursuant to the National Defense Service program of the National Association of Professional Baseball Clubs, the Club estopped itself to deny that the veterans were entitled to reemployment rights, *i. e.*, estopped to deny that their positions were “other than temporary” or that they were “qualified to perform the duties of their former positions,” and estopped to claim that the Club’s change in circumstances made it “unreasonable or impossible” to reemploy them. [R. pp. 119-120; *Niemiec v. Seattle Rainier Baseball Club*, 67 F. Supp. p. 713.]

III.

The District Court erred in failing to hold that, under the evidence, the veterans were “discharged without cause,” and were entitled to have their “loss of wages” computed on the basis of their increased salaries, agreed upon when reemployed (*since such increase was general throughout baseball*) [R. p. 120; *Niemiec* case, 67 F. Supp. at p. 713]; and erred in computing such loss of wages at their pre-induction salary rates. [R. p. 18.]

IV.

The District Court erred in crediting the Club with the amounts of the veterans’ “bonuses for signing” con-

tracts with other clubs, and with the veterans' earnings in post-season baseball games, in computing their loss of wages suffered by reason of their discharges. [R. p. 18.]

V.

The District Court erred in admitting in evidence, over objection by appellants' counsel, the testimony of Robert S. Fausett and Hollis John Thurston, witnesses for the Club, to the following effect, to-wit:

That in their opinions, each of the appellants "did not have a degree of skill and ability (as baseball players) equal to the standards of the Hollywood Baseball Club."

The testimony so objected to, appears on pages 133-137, 146-149 of the Record; and the Court's action appears on page 147.

The grounds of objection stated were:

"Q. Do you think that Knudson possessed the degree of skill and ability sufficient to equal the standards of play of the Hollywood Baseball Club? A. I do not.

Mr. McCall: If your Honor please, I want to object to that question. The manager, the playing manager who just left the stand testified that he did not take into consideration any of the records the player may have had of his play. They didn't know anything about the records and that what he had done, the sole standards that they had were, that he, the manager, decided *whether in his own mind the man had ability greater than another man.*

The Court: This man may have proceeded differently; so let him testify. He is not bound by the other man's testimony.

Mr. McCall: The other man, if your Honor please, was the man who made the decision; and there were no standards he followed.

The Court: Overruled. I think he should answer . . .

Mr. McCall: If your Honor please, I would like first for counsel to specify what he means by 'standards.' If we understand 'standards,' then we can talk about something. But this is pure speculation he is talking about. What are the standards of the Hollywood Club? I object to it because *there are no standards he is talking about*, that is, that *they haven't shown any standards other than the preference of the manager*. The question calls for something that is *speculative entirely*, unless he shows that there are some standards that he is talking about." [R. pp. 146-148.]

VI.

The District Court erred in failing to find and hold, in conformity with the evidence, that the veterans left "positions other than temporary positions" in the Club's employ in order to enter the armed forces; that the Club's "circumstances had not so changed" as to make their restoration to their former positions in its employ "impossible or unreasonable"; that they were "qualified to perform the duties of their former positions," and were duly reemployed at increased salaries pursuant to a general wage increase throughout all baseball; that they were "discharged without cause" within one year after their restoration; and suffered a "loss of wages" by reason thereof; and are entitled to the relief claimed in their petition [R. pp. 12-25.]

ARGUMENT.*

I.

Ball Players Hired Under the Uniform Player's Contract Held "Other Than Temporary Positions," Under Baseball Law and Under STSA Sec. 8(b), and Were Entitled to Be Reemployed After Military Service in Those Positions.

Employment for an indefinite period of time, such as employment at will, is employment in a "position other than a temporary position" under STSA, Sec. 8(b). *Opinions of the Attorney*, Vol. 40, No. 106 (April 8, 1946), modifying 40 Op. A. G. Nos. 36, 66 and 92; *Trusted Funds, Inc. v. Dacey* (C. C. A. 1, 1947), 160 F. (2d) 413; *Daniels v. Barfield* (D. C., Pa., 1947), 71 F. Supp. 884, 886; *David v. Boston & M. R. Co.* (D. C., N. H., 1947), 71 F. Supp. 342, 345.

Even seasonal employment, if customarily renewed at annual rests, has been held to be "other than temporary," and to afford veterans reemployment rights. *Stanley v. Wimbish* (C. C. A. 4, 1946), 154 F. (2d) 773; *Grone v. Congregation, etc.* (D. C., Ky., 1947), 72 F. Supp. 544; *Unruh v. North American Creameries* (D. C., N. D., 1947), 70 F. Supp. 36.

The "recurring seasonal employment" rule should itself afford the veterans relief, without more; for, the contracts of Lilly and Barisoff had been renewed from year to year under the proof, and this was evidence of a custom.

*Note: The evidence, generally and as to each veteran, is stated with citations to the Record under the Facts, *supra*; and a reference thereto in connection with this Argument is here made, without duplicating at length the citations there given.

However, the veterans' rights here are *not dependent* upon that rule. They held "other than temporary positions" under the Uniform Player's Contract, aside from the rule. The contract itself [R. pp. 36-49] shows that it was not seasonal, but annual; and that unlimited renewals thereof for the indefinite future were contemplated by the Club and players.

The Attorney General has given probably the most concise statement of the meaning of "other than temporary position" in the following paragraph from 40 Op. A. G. No. 106 (April 8, 1946), to-wit:

"To determine whether a position was 'temporary' one requires an examination of the contract or understanding of the employer and the employee, as well as the conditions and character of the employment. If the employer and the employee *could reasonably expect, from the conditions surrounding the employment, that the employment was not for a short and limited period*, the employee should be held to be within the group protected by the statute." (Page 4 of the Opinion.)

Analysis of the Uniform Player's Contract shows that it is a contract providing for year-round duties and restrictions on the player, who, although he gets paid only during the official playing season, acknowledges that his salary for that reason is also "consideration" for the "reservations" to the Club covering his activities between playing seasons, and extending into the next, including

spring training, and also consideration for the Club's "renewal option" on his services for the next year. [See Secs. 4(a-b) and 8(a-c), and Regulation 8 of the Uniform Player's Contract, R. pp. 38-39, 41, 47.] The Club must employ each player, under baseball law, under a signed Uniform Player's Contract, filed with and approved by the president of the Association. [Secs. 12 and 13, R. p. 43.] The renewal contract would itself be renewable for the next year, *ad infinitum*. *Niemiec Case*, 67 F. Supp. at pp. 709-710.] So that, the Uniform Player's Contract is an employment contract renewable by the Club indefinitely, although at annual rests, and contemplates employment for the indefinite future, or for so long as the Club wishes.

Presumably, such a contract would be renewed annually for so long as the player's services might be acceptable to the Club; and that is the same as any other employment at will in any other industry. The contract binds the player, at the Club's option, for so long as he wishes to remain in organized baseball. The Club might not be able to compel him to play baseball for it or its assignee, in the event of a renewal unsatisfactory to him as to salary; but it could prevent him from playing with any other club in organized baseball. This "renewal" right is a hold over of a player not enjoyed generally by employers in other industries.

Of course, a player "could go to Mexico," if dissatisfied with the pay rate fixed for him upon renewal of his

contract by the Club, the Executive Committee or the Commissioners, but *he could not play in organized baseball in this country*. [R. pp. 41-44; Secs. 8-9; and R. p. 123.] This "might be pretty hard on him," as the District Court observed [R. p. 123]; but it is contemplated by the agreement, and was so understood by the Club and players.

Hard or not, the point here is that the Uniform Player's Contract contemplates something more than seasonal, or even annual work; it is a *lease on the player's future in organized baseball* which the Club may sell for profit, and it thus envisions a relationship confined not to one season, or to one year, but extending to the indefinite future.

This relationship was terminable at any time by the Club, but not by the player. [Sec. 5(b), R. pp. 40, 162-164.]

The contract provided not only for services to be rendered directly to the Club, but also for services to "any other club" to which the player might be assigned. [Secs. 3(a) and 5(a), R. pp. 38-39.] A hiring for the "club or its assignees" is thus stated; and in playing for another club, a "farmed out" or "optioned" player (a "reserve") is rendering "stand-by" services for the club which owns his contract.

Reserves are not "probationary employees" in any true sense. The probationary period occurs at the annual spring training season when 37 "active and reserve" players are put under contract. Within 30 days after the

opening of the official playing season, these must be divided (or "cut down") to 25 on the "active list" and not more than 12 on the "reserve list." [R. p. 118.]

A reserve player assigned to another club, therefore, is performing the service called for by his contract, just as a player on the active list. The latter may also be "farmed out" or released at the club's pleasure. Each has the same contract status. The fact that officials of the club may privately think of a reserve or even a second-string active player, as being in "probationary use" is not controlling. For there is no "probationary period," or condition, and no contract difference between a star, a second stringer, a "reserve," or an "active" player. All uniformly hold "other than temporary positions" under the STSA.

Furthermore, a significant feature of the National Defense Service program is that a reserve list player was required to be reinstated by the club holding his contract, just as any active player. This was a recognition of the fact that a reserve was a regular and not a probationary player. This reinstatement requirement was also one of the implied terms of the reserve player's employment agreement, to-wit, that if he should be drafted he would be reinstated by the assigning club, regardless of the club with which he might have been playing when called to the colors.

The employment relationship, therefore, was direct and non-probationary.

The four veterans, in fact, were not all reserves.

Dawson was the only one who was a reserve when he entered the armed forces. He happened to be “farmed out” to Memphis at the time. Lilly, on the other hand, was on the Hollywood first-string line-up when he entered the armed forces. Knudson had finished the last playing season on the Hollywood active team; and both Knudson and Barisoff, who had finished the season “farmed out” to Forth Worth, were drafted in the between-seasons lull, and at a time when they were required to appear for Hollywood’s next spring training season under their contracts. Barisoff had reverted to the common pool of Hollywood players under contract.

There was thus nothing seasonal, probationary or temporary about the veterans’ employment. They could “reasonably expect” that their employment was not for “a short and limited period”; and, under the rule stated by the Attorney General, they held “other than temporary positions” entitling them to reemployment under the STSA as well as under baseball law.

The District Court viewed the “at will” nature of their employment as rendering it “temporary” [R. pp. 12-15]; whereas, it is this very factor which characterizes it as “other than temporary” in the view of other courts. See *Trusted Funds, Inc. v. Dacey*; *Daniels v. Barfield*, and *Davis & Boston & M. R. Co., supra*; and compare the *Niemiec Case, supra*.

II.

The Appellee Clubs' "Circumstances" Had Not So Changed as to Make It Impossible or Unreasonable to Restore the Veterans to Their Former Positions in Its Employ; and the Evidence Does Not Support the Findings That They Were Not "Qualified" Therefor, or That They Gave "Cause" for Discharge.

It is no part of the veterans' Argument that they were (star) performers on the Hollywood team when inducted.

They were players of ordinary, mediocre skill, and this Argument goes no farther; although Barisoff's 1946 record at Bremerton, setting two new batting records for the league, and Dawson's record with Yakima, second from top in runs brought in, indicate they had unusual ability. We do not claim unusual qualifications, however.

Prior to induction, only Lilly was a first string Hollywood player, and he for only a few weeks. Dawson and Barisoff last played as Hollywood reserves, with Memphis and Ft. Worth, and Knudson was a mere "rookie" pitcher for Hollywood. None were stars.

The basic question then is: Whether the Pacific Coast League change, from Class AA to Class AAA, made it "unreasonable" to reemploy returning veterans of ordinary, mediocre skill in that league? The answer should have been "No."

The league classification change merely authorized larger salaries for players. It did not automatically insure immediate better baseball, or better players, to any club in the league. Better baseball depended upon securing better players; but better players would have to come from

the major leagues, which continued to pay better salaries than even the top class of minor league clubs. Also, good professional ball players were already bound to other clubs under the Uniform Player's Contract. Since each club had to depend upon its quota of men bound to it under such contracts to supply the core of its team for the next year, it was not reasonably to be expected that there would develop any sudden influx of loose, stellar talent to the Pacific Coast League in 1946 merely because its clubs could pay increased salaries.

As a practical matter, marked improvement in the league's talent would have to await several seasons. It could not be immediate. Better players would have to become available as free agents, and lured with "bonuses for signing"; or bought from clubs holding their contracts, at prices proportionate to their real worth as players.

The task of improving a professional baseball team is thus not a mere overnight stunt. It requires time as well as much money. Better players have to be both found and secured, before there is better baseball; and stellar players are scarce, already tied under contracts, and come rather dearly.

The proof does not show that in 1946 there was any improvement whatever in talent in the Hollywood Club or the Pacific Coast League. Presumably, therefore, there was no improvement, since the burden was on the Club to make out this defense.

The Association's National Defense Service program, under which these veterans and others were reinstated in the Pacific Coast League clubs, is a recognition of the facts: (a) That the classification change did not affect

reinstatement rights under that program; and (b) that players of ordinary skill and ability were entitled to reinstatement in the Pacific Coast League. This program covered all clubs in the league; and Hollywood was entitled to no greater freedom than Seattle, although such an advantage was given Hollywood by the decision in this case.

These veterans were “qualified to perform the duties of their former positions” as *ordinary baseball players*, *i. e.*, on the second string or reserve list. There is no evidence that they were not so qualified. The fact that they secured other places in organized baseball, and gave satisfaction in some evidence that they were so qualified. This observation covers the cases of Lilly, Barisoff and Dawson completely.

It is true that Knudson was released by Fresno shortly after he went there, but the record affords no evidence that such release was for “cause.” Fresno had the right to release him, with or without cause. His release by Fresno did not, *per se*, justify Hollywood’s simultaneous release, for that could be justified only by “cause.” 50 *U. S. C. A.* App., Sec. 308(c). He was, in fact, recalled and played by Fresno after his release.

“Unreasonable” means more than “less desirable,” “inconvenient” or “more expensive”; and more than that another employee is better or more efficient. *Kay v. General Cable Corp.* (C. C. A. 3, 1944), 144 F. (2d) 653.

That a better player is available to the employer is not “cause for discharge” of a veteran during his reemployment year. *Kay v. General Cable Corp.*, and *Niemiec Case*, *supra*; *Hoyer v. United Dressed Beef Co.* (D. C., Calif. 1046), 67 F. Supp. 730.

III.

By Reemploying the Veterans, the Hollywood Club Is Estopped to Deny They Were Qualified, and Estoppel to Claim That Its Changed Circumstances Made Their Reinstatement "Unreasonable."

If the Club had reason to claim that the veterans were not qualified, or that its changed circumstances made it unreasonable to reinstate them, it could have processed the dispute under the Association. [Sec. 9, R. p. 41.]

Instead, the Club reinstated the veterans. Upon accepting the proffered employment, the veterans acknowledged their subservience to the Hollywood Club in the realm of organized baseball, and gave up their status as "free agents." Thereafter, they could seek other like employment in organized baseball only after being released (discharged) by Hollywood, a circumstance which would affect their desirability as players with other clubs, and reduce the amounts of money they might receive as salaries or as "bonus for signing" with other clubs.

Hollywood's failure to process its claim under Section 9 of the contract, at the time the veterans applied for reemployment, caused them to alter their positions by accepting the work, to their prejudice.

Having put these men under contract for 1946, the Club waived these defenses and is estopped now to assert them. (*Niemiec Case, supra*, at p. 713.)

IV.

The Veterans Were Not Guilty of Laches.

The doctrine of laches is based on estoppel, and the maxim of unclean hands. It is an affirmative, equitable defense. Mere lapse of time does not constitute laches. In addition to lapse of time, the party asserting laches must show that the delay was not induced by any act of his; and that, because of the other party's inexcusable delay, *his position has so changed* as to make it inequitable for the other to have relief. 30 *Corpus Juris Secundum*, 531-537, Equity, Sec. 116; 2 *Cyc. of Fed. Proc.* (1928), 506-514, Sec. 412; 5 *Cyc. of Fed. Proc.* (2d, 1943), 52 *et seq.*, Secs. 1519-1520, 1526, 1527; *Smetherham v. Laundry Workers Union* (1941), 44 Cal. App. (2d) 131, 111 P. (2d) 948, 952-953; *Winn v. Shugart* (9 C. C. A., 1940), 112 F. (2d) 617, 623.

The Club's position as to these veterans was not changed. Negotiations by the Selective Service System begun promptly after the discharges, did not induce the Club to make any amelioriation.

As said System was a governmental agency acting in the public interest on behalf of the veterans, its failure to secure an adjustment with the Club is not to be charged as laches to the veterans. The same is true of the United States Attorney's office. *Kay v. General Cable Corp.* (D. C. N. J., 1946), 63 F. Supp. 791; *Hayes v. Boston & M. R. Co.* (D. C. Mass.), 66 F. Supp. 371, 373; 50 *U. S. C. A. App.* Sec. 308 (*e. g.*).

The mere fact that the Club persisted in its unlawful action toward the veterans, thereby causing their loss of wages to increase, is not laches. *Smetherham v. Laundry Workers Union, supra.*

V.

The Veterans Were Entitled to General In-Grade Increases in Salaries; and to Have Their Loss of Wages Computed on the Basis Thereof, Without Deductions of "Bonuses for Signing" Contracts With Other Clubs After Discharge, or Deductions of Post-Season Earnings.

The Uniform Player's Contract refers to "the salary rate usually paid . . . to other players of like ability," and obligates a player, upon being assigned to another club, to accept the salary rate usually paid by that club. [Sec. 5(a), R. p. 39.]

A provision of the National Defense Service program was that veterans should be reinstated at a 25% salary increase over their former positions. [R. p. 121.] This was a general in-grade increase for veterans, and they were entitled to it, and to have their loss of wages computed on the increased wage at which they were re-employed. *Niemiec Case* at 67 F. Supp. 713; *Levine v. Berman* (C. C. A.-7, 1947), 161 F. (2d) 386; *Martin v. Doane Co.* (D. C. Mass., 1947), 68 F. Supp. 783, aff'd on this point on appeal (C. C. A.-1, July 17, 1947); *Freeman v. Gateway Baking Co.* (D. C. Ark., 1946), 68 F. Supp. 383.

The same is true, under the same authorities, with respect to a player who has been reemployed at a higher individual rate of pay than 25%, as in the case of Barisoff and Lilly, whose contracts called for a 50% wage increase. The reemployment provisions do not limit the amount of pay a veteran is to receive when restored to his former position. The words "like pay" merely furnish a wage floor, not a ceiling. *STSA*, Sec. 8(b)(B), 50 U. S. C. A. App. Sec. 308(b)(B). The loss of wages is to be

computed under Section 8(e) not at the wage of the former position of the veteran, but at the wage of the position from which he is "discharged without cause" contrary to Section 8(C), meaning the position in which he has been *reemployed*. 50 U. S. C. A. App. Sec. 308(c. e).

There is no evidence whatever, to support the finding that the increased wages were "based upon the right and privilege of respondent (the Club) to terminate each such reemployment." [R. p. 20.] No one so testified, and no such claim was advanced at the trial.

The "bonuses for signing" contracts to play baseball with other clubs were not "earnings" for the 1946 playing season, which was the sole time in which Hollywood had an interest. The bonuses were for control of the player's future in baseball, including all renewals of the contract. Hollywood had abandoned its option by discharging the veterans.

Presumably, they will have to reimburse the clubs for these "bonuses", if they should be reinstated with Hollywood; and such bonuses ought not to be *charged twice to the veterans*, once in favor of Hollywood and again in favor of the other clubs.

"Earnings in other employment", if deductible in computing a veteran's loss of wages, means compensation for work, not extra income. Thus, the expression does not include earnings from work performed during a time when the veterans would not have been employed by Hollywood, which had abandoned its option on their future work. 39 *Corpus Juris* 116-117; 16 *Cal. Jur.* 986; *Sanders v. Schenley Products Co.* (C. C. A. 2, 1939), 108 F. (2d) 23, 25. Nor does it include strike benefits or governmental benefits, which are not "earnings." *Hoyer v.*

United Dressed Beef Co. (D. C., Calif. 1946), 67 F. Supp. 730; *N. L. R. B. v. Brasher Freight Lines* (C. C. A. 8, 1942), 127 F. (2d) 198; *Marshall Field & Co. v. N. L. R. B.* (1943), 318 U. S. 253.

The "bonuses" given Dawson and Lilly by Yakima, and the Barisoff's 10% split with Bremerton on the Giants' \$4,000 payment for his option, were for *future employment and renewal rights*, not for 1946 playing season salaries. Consequently, this extra income cannot be claimed by Hollywood in reduction of the veterans' loss of wages.

The same is true of Lilly's \$1,800 earnings from Hermosillo, in Mexico. These were earned at a time when Lilly would not have been gainfully employed under his Hollywood contract.

VI.

Testimony of the Club's Witnesses (Fausett and Thurston) That in Their Opinions the Veterans Did Not "Have a Degree of Skill and Ability Equal to the Standards of the Hollywood Club" Was Both Incompetent, and of No Evidentiary Weight.

These naked opinions were not supported by factual testimony. That is, no facts concerning the actual performance of the veterans were given in evidence as the basis for any such opinions; and no measure of standard of performance was proved. The testimony was therefore nebulous, conjectural, and of no value whatever. [R. pp. 133-137, 146-149.]

A standard is "an accepted or established rule or model." It is also defined as:

" . . . Being, affording or according with a standard for comparison."

“That which is set up and established by authority as a rule for the measure of quality, weight, extent, value or quality; esp. the original specimen weight or measure.”

“That which is established by authority, custom or general consent as a model or example; criterion; test; in general a definite level, degree, material, character, quality or the like, viewed as what is adequate and proper for a given purpose.”

Webster's New International Dictionary (2d Ed.).

The gist of the two witnesses' testimony was that there are no such standards to which they were referring; that the matter of employment rested entirely with the team manager; and that the veterans were released solely because other men were available whom they considered better.

An expert, testifying as to his opinion based on facts within his own knowledge, must first state those facts on which his opinion is based. His naked opinion is not evidence. *Raub v. Carpenter*, 187 U. S. 159, 47 L. Ed. 119, 23 S. Ct. 72; Note: 82 *A. L. R.* 1340; Text: 20 *Am. Jur.* 666-668, *Evidence* Sec. 794-795.

The existence of standards is as much a fact to be proved as are the facts to be measured by the standard. If there are neither standards nor facts in evidence, an opinion based on the two is too nebulous and conjectural to rise to the dignity of evidence. *Atlantic L. Ins. Co. v. Vaughn* (C. C. A. 6), 71 F. (2d) 394, 395; *U. S. v. Howard* (C. C. A. 5, 1933), 64 F. (2d) 533, 534-535; *U. S. v. American Tobacco Co.* (D. C. Ky., 1941), 39 F. Supp. 957; *Eisenmayer v. Leonardt* (1906), 148 Cal. 596, 600,

84 Pac. 43; *Hornby v. State L. Ins. Co.*, 106 Neb. 575, 184 N. W. 84, 18 A. L. R. 106; Texts: 20 *Am. Jur.* 661, 666, *Evidence*, Secs. 787, 795, and 32 *C. J. S.* 220, *Evidence*, Sec. 522.

The testimony objected to proved nothing except that, as stated in the *Niemiec Case*, *supra*, there was no standards or qualifications at all, and the opinions were worthless for any purpose, though admitted. *U. S. v. Howard*, *supra*.

VII.

The Lapse of a Year After Original Reinstatement by the Club Has No Effect on the Jurisdiction of the Court to Order Reinstatement of the Veterans for the Period of the Reemployment Year That Remained Unexpired When They Were Unlawfully Discharged, or to Award Their Interim Loss of Wages.

Although some District Courts have expressed the view that reinstatement cannot be ordered after the end of one year from the date of reemployment under STSA, Secs. 8 (c, e), this view is out of harmony with the purpose and language of the law, and is an unjustified, self-imposed negation of powers by such courts.

The one-year period was inserted in Section 8(c) for one purpose only, namely, to *forbid the discharge of a re-employed veteran* within that time. It has nothing to do with when he may be reinstated. The purpose of the law was to rehabilitate veterans by affording *a year of*

active work in which to regain and refurnish their skills, and to protect them therein against arbitrary discharges and unequal competition. *Kay v. General Cable Corp.*, *supra*. The period of this protection was not intended by Congress as a limit on judicial action to enforce it.

When a veteran has been rehired and discharged without cause, he has not received the benefits which the law provided for him; and the District Courts in that case can "require the employer to comply with the provisions of Sections 8 (b and c)" by ordering reinstatement and compensation for loss of wages. *STSA*, Sec. 8(e), 50 U. S. C. A. App. Sec. 308(e).

Now, it is quite clear that the one-year period does not start *until the date when the veteran has been restored* to employment. So, the employer may be compelled, when reemployment has been totally denied, to reinstate the veteran for a full year with interim loss of wages from the date of his application. *Kay v. General Cable Corp.* (D. C. N. J., 1945), 59 F. Supp. 358 (D. C. N. J., 1946), 63 F. Supp. 791; *Hall v. Union Light & Power Co.* (D. C. Ky., 1944), 53 F. Supp. 817; *MacMillan v. Montecito Country Club* (D. C. Calif., 1946), 65 F. Supp. 240.

Assuming, however, that instead of being refused reinstatement at the outset, the veteran has been first hired and then fired unlawfully. Is he any less entitled to the full year of work (with interim loss) than his brother-in-arms who was refused work when he applied? There can be no doubt that the District Courts can, and should, com-

pel his reinstatement for the portion of the reemployment year that remained unexpired when he was discharged. Such a rule equalizes the rights of veterans, *inter sese*, and makes the employers' obligations equal.

If it is proper to compensate the first veteran with a full year of work plus his interim loss of wages preceding his forced reinstatement, it is just as proper to compensate the unlawfully discharged veteran for his interim loss, after his discharge and before his second reinstatement. *Hoyer v. United Dressed Beef Co.* (D. C. Calif., 1946), 67 F. Supp. 730.

Under the contrary rule, an employer, by flouting the law, cuts down the veteran's assumed year of rehabilitating work, and escapes by merely paying him his "loss of wages" for that year. Thus, he accomplishes the very thing which, in *Kay v. General Cable Corp.*, the Court said could not be done, namely, force the veteran to accept *a year of wages in lieu of the year of work Congress provided*; except that the year's wage, in fact, is further reduced by his earnings in other employment. The primary purpose of the Act is thus evaded.

The expiration of the calendar year during the continuance of an employer's "unlawful action" ought to afford the employer no such unfair advantage. He should be required to give the veteran the year of work provided by the law, although he has delayed it by disobeying the law. No other rule is consistent with the purpose or language of the reemployment provisions.

VIII.

**There Is No Characteristic of the Baseball Business
Which Entitles It to Exemption From the Com-
mon Obligation to Reemploy Veterans.**

The reemployment provisions apply to "any employer." 50 *U. S. C. A.* App. Sec. 308(b).

The reasoning of the District Court herein, however, would exempt any employer whose work force is limited, whose business is competitive, and whose employees agree to be discharged at will. [R. pp. 12-15.] This describes any small business.

If this rule were generally applied, only large employers with job security written into union contracts, would fall within the meaning of "any employer" in the reemployment provisions.

The manifest truth is that a baseball club is not different from any other small employer. All such businesses are competitive, the number of employees they may use is limited (whether by business economics or Association rules is immaterial), and it is not at all a rare occurrence for a small employer to find it more desirable, efficient or convenient to fail to reemploy returning veterans. Others have had to comply, why not Hollywood?

Mere competition is no justification for relieving an employer of his clear obligations under the law. To relieve one is to give him an advantage over his competitors, who must obey law. Which was precisely what was done in this case, to-wit, Hollywood was liberated while its competitor, Seattle, was forced to meet its duty of reemploying veterans. This was unfair. It is not "unreasonable" to require competitors to observe the same rules.

There is not a single characteristic of baseball by which it may be distinguished from any other small, competitive business. The Act covers all employers, and exempts none.

Conclusion.

The views of the District Court as to the coverage of the reemployment provisions were out of harmony with other courts, and ought to be rectified.

Notwithstanding the *Niemiec Case*, the Club took the position in court that the team manager was the sole judge of whether a ball player might be retained in employment, regardless of the reemployment provisions. Accordingly, it made no effort to show by proof that the veterans were not qualified to fill their former positions with the Club. It relied wholly on the *ipsi dixit* of the manager, that the veterans should be discharged because other available men were better, in his opinion.

We submit this did not show any "cause for discharge," and did not show any disqualification, and that the veterans are manifestly entitled to relief.

Respectfully submitted,

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No. 11706.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT L.
DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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IN THE

United States Circuit Court of Appeals
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DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

This action was commenced by four veterans of the armed forces seeking compensation because of their respective discharges by the appellee Hollywood Baseball Association (respondent below). The appellants (petitioners below) sought to bring themselves within the re-employment provisions of the Selective Training and Service Act of 1940, Section 8, as amended (50 U. S. C. A., App. Sec. 308). The pertinent provisions of the Selective Service Act are:

Section 8(b):

“In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the

employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year . . .

“(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so; . . .”

Section 8(c):

“Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave or absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.”

Subdivision (e) of Section 8 confers jurisdiction upon the district courts of the United States to require employers to comply and to compensate veterans for loss of wages by reason of unlawful action by employers.

Statement of the Case.

Each of the four appellants was under contract as a baseball player to the Hollywood Baseball Association at the time that he entered the military service, and each was honorably discharged from such service and thereafter made application for reemployment with the Hollywood Baseball Association (herein called "the Club"). During the 1946 training period and/or regular season, each of the appellants was signed to a uniform player's contract for the 1946 season and tried out for varying periods of time before being given an unconditional release. The appellant players contend the releases by the Club constituted a violation of the duties imposed upon employers by Section 8 of the Selective Service Act, and they sought compensation for alleged loss of wages and two of them sought orders that the Club restore them to employment.

The respondent baseball club, by its answer, interposed defenses:

1) That the character of the petitioners' (appellants herein) pre-service employment did not come within the provisions of the Selective Service Act for the reason that the employment of each of the petitioners was *temporary* in nature.

2) That the petitioners *had not suffered any loss of wages* because of their discharges by the Club, but that they had earned wages, salary or bonuses during the periods for which they claimed reemployment rights and damages which would not have been earned had they been reemployed by the Club.

3) That the petitioners were *not qualified* to perform the duties of the positions, which they had temporarily held before entry into military service, after return from such service.

4) That at the time of the petitioners' application for reemployment the respondent Club's *circumstances had so changed as to make it unreasonable* to require the restoration of the petitioners to positions of employment.

5) That each of the petitioners was *discharged for cause*; to-wit, inability to play baseball with skill and ability.

6) That each of the petitioners *waited an unreasonable length* of time from the alleged unlawful discharge by respondent in which to commence this action and that the unreasonable delay prejudiced the respondent.

The case was tried on March 6, 1947, before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury, and on March 25, 1947, the Court made its findings of fact and conclusions of law which specifically found for the appellee, Hollywood Baseball Association, on each of the separate defenses and the decree was entered accordingly. The appellants have appealed from that decree. The "appellants' statement of points on which they intend to rely on the appeal" [R. pp. 159-161] contains a general assignment of error because of refusal of relief and then states that "the pleadings, the evidence and the applicable law are insufficient to, and do not support the trial court's" findings. The basis of the appeal must therefore be found in the alleged insufficiency of the evidence to sustain the findings, which is also set forth as point I of the Specification of Errors in Appellant's brief (Br. p. 37). Apparently the appellant seeks to enlarge the scope of this Court's review, for the

Specification of Errors includes matters not set forth in the Statement of Points on which appellants intended to rely. In any event, it is the belief of the appellee Baseball Club that there was abundant evidence to support the findings of fact, and that the trial Court committed no error in respect to the other matters that appellants have set forth in their brief.

Effect of the Niemiec Case.

Both at the trial and upon this appeal, counsel for the appellants has stressed the case of *Niemiec v. Seattle Rainier Baseball Club* (D. C., Wash., 1946), 67 Fed. Supp. 705, and attempted to show a conflict between that case and the decision in the present case. Without debating the soundness of the *Niemiec* case, it is sufficient to state here that the evidence in the two cases distinguishes them. (*Niemiec* was a first string player and most valuable man on Seattle team prior to military service; the petitioners were rookies being tried out for the Hollywood team.) Both presented questions of fact for decision, and upon easily distinguishable facts different results were quite naturally reached. Appellants have misconstrued the effect of the trial Court's decision in this case by assuming that it held that *all* players under contract with the Hollywood Baseball Association held "temporary" positions, and were therefore excluded from the benefits of the Selective Service Act. Such a broad question was not at issue where the evidence showed that the petitioners were not regular members of the appellee's baseball team. The only point properly before the trial court on this issue, and

the only point decided by it, was that these petitioners, the appellants, held "temporary" positions. Likewise, in respect to the special defense that the employer's circumstances had so changed as to make it unreasonable to restore the petitioners to positions of employment, the findings of the Court cannot be enlarged to apply to all of the persons who might have been in the employ of the Hollywood Baseball Association.

In the *Niemiec* case the Court found that there was no evidence to support a finding that *Niemiec* was not qualified to perform the duties of his position and no evidence to show that his discharge was for cause. In the present case, the evidence was presented to the Court as to the playing ability of each of the petitioners, and upon the basis of that evidence, it was properly found that they had each been discharged for cause.

Questions Involved.

The true question involved in this appeal is the sufficiency of the evidence to support the findings on the different defenses set up by the appellants. Thus, this Court, on appeal, is not concerned with the weight or preponderance of the evidence, which matters are peculiarly within the province of the trial Court; findings made on conflicting evidence are binding and conclusive on the Appellate Court and should not be disturbed unless clearly erroneous. (Federal Rules of Civil Procedure, Rule 52, (a); *Lerner Stores Corp. v. Lerner*, C. C. A. Cal. 1947, 162 F. (2d) 160; *Gates v. General Casualty Co.*, C. C. A. Cal. 1941, 120 F. (2d) 925.)

The Facts.

The pleadings [R. pp. 2 and 7] establish that the Hollywood Baseball Association operates a professional baseball club in the City of Los Angeles, California. Each of the appellants had entered into a written contract with the appellee Club before entering military service. These contracts were on forms known and hereafter referred to as "Uniform Player's Contract." In the case of each player there was a contract prior to military service, and one subsequent to military service—both of which were with the Hollywood Club, and then another contract between the player and the baseball team he played with after leaving the Hollywood Club. The original contracts and other exhibits are on file in the office of the clerk of this Court. However, the parties by stipulation [R. pp. 162-164] have prepared and presented a Table of Contracts, the data from which, when read into the appropriate places in the Uniform Players Contract, printed in full in the Record, pages 35-49 [Pltf. Ex. No. 2], will enable the Court to reconstruct Plaintiff's Exhibits Nos. 1, 3, 5, 8, 9, 10, 11, 13, 14, 15 and 16 without the necessity of referring to the originals filed with the clerk.

The Uniform Players Contract requires the player to render skilled service as a baseball player [R. p. 36, Uniform Contract, Art. 1], for which the club agrees to pay a monthly salary beginning with the commencement of the club's playing season (or such subsequent date as the player's service may commence) and ending with the termination of the Club's scheduled playing season [R. p. 37, Uniform Contract, Art. 2].

Article 5(b) of the Uniform Player's Contract provides [R. p. 40]:

“5(b) Termination

This contract may be terminated at any time by the Club or by any assignee by giving official release notice to the player.”

The contracts also provide that a player may not play baseball otherwise than for the contracting club or its assignee except in conformity with certain rules and that he will not play in any such baseball games after October 31st of any year until the following spring training season [R. p. 39, Contract, Art. 4(b)]. The purpose of these contracts and the National Association Agreement and the Major-Minor League Agreement and Rules is:

“to insure to the public wholesome and high-class professional baseball by defining the relations between club and player, between club and club, between league and league . . .” [R. p. 36, Contract, recital.]

The fact that the Great American Pastime is a competitive sport is a matter of common knowledge, and it is almost equally well known that the different teams or clubs are eternally seeking new and better players so as to provide the public with the best possible entertainment. A considerable group of baseball “scouts,” experts in their trade, conduct a constant search for new talent—directed primarily towards young ball players. As a consequence, large numbers of individuals are “signed” to baseball contracts; in fact, many more are signed than a professional club is allowed to retain under contract. [R. pp. 102-103]. The general purpose of hiring the additional players is for the development of young ball players

and to give them an opportunity to play professional baseball; and, if they don't make the ball club they have signed with, they are sent out for additional experience to the various leagues of lower classification or released [R. pp. 103-104]. Some of the prospects are "farmed out" with the hope that they will develop their ability and skill as baseball players. The tenure of employment of each player is not dependent on seniority, but is dependent upon the professional skill of the individual in a highly competitive sport [R. p. 105]. In entering into contracts with ball players the different baseball clubs, and the players as well, are mindful that the contracts are terminable at the will of the club and as a consequence the clubs take on many more players than are needed [R. pp. 103-104].

Each of the appellants was employed *strictly as an inexperienced prospect during the period before his entry into military service, and none of them was a regular team player on the Hollywood Baseball Club* [R. pp. 106-107, testimony of Oscar Reichow, Business Manager of the Hollywood Club].

The facts in the case of each appellant are:

WILLIAM BARISOFF.

William Barisoff, 25 years of age, began playing professional baseball in 1940, at the age of 18. In that year, he was put under contract by appellee Hollywood Baseball Association at \$150.00 per month, and optioned to the Salinas (Kansas) Club in a Class C league [R. pp. 30, 31, 57]. Hollywood renewed his contract in 1941 and farmed him out, first to San Bernardino, another Class C Club; and then to Santa Barbara, a team of like class [R. pp. 31, 57]. His contract was again renewed by Hollywood in 1942 and he was farmed out to the An-

niston (Ala.) Club in the Southeastern League (Class B), where he played a month and was then called back to Hollywood. He was a regular on the teams of the clubs to which he had been optioned or farmed out, and played in a large number of their games.

After being recalled to Hollywood he did not play many games, and was then farmed out to Fort Worth for the balance of the 1942 season, which he completed there.

In November, 1942, he was inducted into the Navy after the close of the baseball season. He was then still under contract to Hollywood at a salary of \$200 per month [Pet. Ex. No. 1, R. pp. 33, 163].

He was honorably discharged December 7, 1945, and in the same month applied to Hollywood for reemployment.

On February 18, 1946, Hollywood placed him under contract for 1946 at \$300.00 per month [R. pp. 34, 35, 50; Pltf. Ex. No. 2, R. pp. 35-49]. He reported for spring training with the Hollywood team at Ontario, Calif., for about six weeks.

During this spring training period, the field manager of the Hollywood Club, Robert S. Fausett, a man of eighteen years' experience in professional baseball, including the management of four different clubs [R. p. 131], observed Barisoff's play. As a manager, one of Fausett's duties was to select and evaluate ball players [R. p. 132]. Upon sufficient observation to form a judgment as to Barisoff's ability to play baseball, Fausett testified that Barisoff did not have a sufficient degree of professional skill and ability to meet the standards of the Hollywood Baseball Club [R. p. 133]. Barisoff had been given an opportunity and chance to demonstrate his ability in exhibition games [R. pp. 137, 139].

Hollis John Thurston, scout and coach for the Hollywood Club, with thirty-two years professional baseball experience including nine and a half years in the major leagues also testified with respect to each of the appellants [R. p. 145, *et seq.*]. As a scout his duty was to make recommendations on the ability of baseball players. During the 1946 training season, he observed Barisoff sufficiently to form an opinion as to his ability, and that opinion was that Barisoff was a pitcher who couldn't throw very well.

Accordingly, Barisoff was released on March 26, 1946, and paid \$150.00 by the Hollywood Club.

On April 24, 1946, Barisoff was put under contract by Bremerton, a Class B club, at \$175.00 per month, with a provision that he would receive 10% of the sale price of his contract, if sold [Pet. Ex. No. 3, R. pp. 53 and 163].

After the close of the season, on September 8, 1946, Bremerton optioned Barisoff to the New York Giants, a major league baseball club, for \$12,000.00; \$4,000.00 down and the remaining \$8,000.00 to be paid on taking up the option, after a 30-day test with the Minneapolis Club [R. pp. 56, 58]. Barisoff received \$400.00 as his 10% on the \$4,000.00 paid by the New York Giants, under the above "bonus" clause of his Bremerton contract.

On this testimony the Court found that Barisoff was not qualified and that he received \$1,325.00 in wages, salaries and bonuses during the 1946 season which he would not have earned had he been reemployed by the Hollywood Club [R. p. 18].

ARTHUR M. LILLY.

Arthur M. Lilly was put under contract by Hollywood in 1942 and optioned to Tacoma, in the Western International League (Class B) [R. pp. 59-62].

During the 1943 season he was put under contract by Hollywood, at a salary of \$300.00 per month and played as a "utility" man [R. p. 107].

Lilly was honorably discharged from the Army on January 9, 1946, and on February 18, 1946, he signed a contract with Hollywood at \$450.00 per month. He attended 1946 spring training.

Manager Fausett and Scout Thurston each observed Lilly during spring training and until he was released on May 26, 1946, and each was of the opinion that Lilly was not equal in ability to the standard of play in the Pacific Coast League [R. pp. 133, 150]. Coach Thurston worked particularly with Lilly in an attempt to improve his batting, but was unable to bring him up to the standard of the ball club [R. pp. 79, 150].

On June 7, 1946, Lilly was employed by the Yakima Club (Class B) at a salary of \$200 per month with a \$500.00 "bonus for signing." This contract was on the Uniform Player's Contract Form.

After his discharge on May 26, 1946, Lilly earned \$660.00 salary from Yakima (June 7-Sept. 8 at \$200.00 per month), and \$1,800.00 from Hermosillo, Mexico, from October 16, 1946, to February 18, 1947 [R. pp. 78-79].

The Court therefore found that Lilly was not qualified and that he received \$885.00 from Hollywood, \$1,160.00 from Yakima and \$1,800.00 from Hermosillo, or a total of \$3,855.00, in wages, salaries and bonuses which he would not have earned had he been reemployed by the Hollywood Club [R. p. 18].

HUBERT L. DAWSON.

Hubert L. Dawson was put under contract by Hollywood in 1943, at \$300.00 per month, *and was used about five times as a pinch hitter on the Hollywood active team*, until he was optioned to the Memphis, Tenn., Club (Class A-1). He played on the Memphis team until he entered the service on June 24, 1943 [R. pp. 91-94, 163; Ex. 14].

He was placed on terminal leave April 6, 1946, and was honorably discharged April 20, 1946.

On April 1, 1946, he applied for reemployment, and signed a contract with Hollywood to play baseball at \$375.00 per month in 1946. He was released on April 14, 1946 [R. pp. 95-96]. On April 24, 1946, he signed with Yakima at \$200.00 per month and a bonus of \$450.00.

Both Manager Fausett and Coach Thurston testified that Dawson did not have a degree of professional skill and ability sufficient to equal the standards of the Hollywood Baseball Club [R. pp. 133, 150]. The Court found that he was not qualified and that he had earned \$1,583.50 during the 1946 season.

ROBERT I. KNUDSON.

Robert I. Knudson, 21 years of age, began playing professional baseball with Hollywood in 1943, when he was 18 years old. In that year, he was a pitcher on a high school team, until the close of school in June; and was then put under contract by Hollywood at \$200.00 per month, as a "rookie" pitcher from June until the end of the season 1943. He played only as a "relief" pitcher and won no games.

In February, 1944, he entered upon active duty in the Army, and was honorably discharged May 5, 1946, after the start of the Hollywood playing season.

He applied for reemployment and on May 29, 1946, was put under contract by Hollywood at \$250.00 per month, and was immediately optioned to Fresno (Class C), after having worked out with the Hollywood team [R. p. 132].

Knudson was released on July 29, 1946, by the Hollywood Club [R. p. 83] and on August 15, 1946, he signed with the Fresno team at a salary of \$200.00 per month [R. p. 86]. The Court found that he was not qualified and was discharged for cause on the basis of testimony by Manager Fausett and Coach Thurston that Knudson did not have the skill or ability to play ball up to the standard of the Hollywood Team [R. pp. 133, 149-150]. The Court also found that he earned \$706.61 from the time he returned from military service (Knudson did not rejoin the Club until May 29, 1946, when the season was under way) [R. p. 82].

ARGUMENT.

I.

Each of the Appellant's Held Only a "Temporary Position," as a Rookie Baseball Player, and Did Not Come Within the Reemployment Provisions of the Selective Service Act.

The rights, if any, of the petitioners in this case are based entirely on Section 8 of the Selective Service Act which is quoted in the portion of this brief discussing the Court's jurisdiction. Therefore, before these petitioners are entitled to claim the benefits of this statute, they must come within its language, *i. e.*, they must have held "*a position other than a temporary position.*"

In *Bryan v. Griffin*, 67 Fed. Supp. 714, it was held that the term "temporary position" should be interpreted according to common usage. The appellee, Hollywood Baseball Association, is fully aware that by this section of the Selective Service Act Congress sought to assist those who served our country in its time of great need; that the act required reemployment of veterans whose employment had been "at will" or was "seasonal." However, it is equally clear from the language of the Act, as well as the decisions applying it, that Congress did not extend the reemployment benefits to every employee irrespective of the nature of his position. *Fishgold v. Sullivan Drydock*, 328 U. S. 275, 90 Law Ed. 961, 66 S. Ct. 1105. In many instances the courts have found that particular veterans held only "temporary" positions. *Fraser v. Shoberg*, 65 Fed. Supp. 83 (a secretary-treasurer of a union who had been elected for a year's term held to have a *temporary position*). *Gualtierri v. Sperry Gyroscope Co.*, 67 Fed. Supp. 219; *Salzman v. London Coat of Boston*, 156 F. (2d) 538, cert. den. 67 S. Ct. 501 (temporary pending return

of another man from military service). The case of *McCarthy v. M. & M. Transp. Co.*, C. C. A. 1947, 160 F. (2d) 322, held that a veteran, to compel his reemployment, must prove that he left a position which was permanent in its nature. The burden of sustaining his case is upon the petitioning veteran.

The precedents can only serve as a guide in determining the true nature or character of these appellants' pre-service employment; the trial Court very properly looked to the circumstances surrounding the ball players' positions and then found the fact to be that the positions were temporary. In this connection, Mr. Oscar Reichow, a man of thirty-eight years' experience in professional baseball, explained the relationship between the appellants and the Hollywood Club [R. pp. 101-107]. Reichow's testimony was to the effect that baseball clubs hire many players in their search for a winning team.

The rules of the various leagues limit the number of players that can be under contract to a particular club at a particular time. Untested and unproven players are taken from high school, college, and semi-pro teams and signed to contracts to give them experience and training under professional supervision. The tenure of employment of each such prospect is in no way dependent on seniority; it is strictly a matter of professional skill in a highly competitive field. Those who are gifted to go on to large financial success while others attain more moderate success, and many fall by the way. There are even varying degrees amongst those who fall by the wayside, so that some last only a few weeks and others last a few seasons. With specific attention to the players involved in this case, it is to be noted that they were all inexperienced prospects in a developmental stage [R. pp. 106-107]. None had reached the status of a regular; for

each the Hollywood Club had hopes that he would, with experience, improve sufficiently to make its team. In reliance upon the termination provision of the Uniform Player's Contract the Hollywood Club signed large numbers of players in its process of searching for good players. This situation points to a clear-cut distinction between the facts of the present case and those of *Niemiec v. Seattle-Rainier Baseball Club*, 67 Fed. Supp. 705. *Niemiec* had been the outstanding second baseman of the Pacific Coast League during the season before entering military service; just before he was discharged by the Seattle Club its manager and vice-president gave *Niemiec* a letter extolling his baseball ability, and declaring that he had been a star on the team for the three years preceding his service and during which Seattle won the championship each year.

Appellants cite (App. Br. p. 42) an opinion of the attorney-general intended to assist in determining what is the meaning of the statutory language "other than a temporary position." That opinion requires examination of the contract and the conditions and character of the employment. The contracts here involved expressly provided that the employment of each appellant might be terminated at will and it was clearly and mutually understood between the players and the employer that their tenure was dependent upon showing progress and improvement in the art of playing baseball. Judge Cavanah correctly found that the petitioners held temporary positions and were not included within the reemployment provisions of the Selective Service Act [R. pp. 20-22].

II.

**The Petitioners Did Not Suffer Any Loss of Wages
Because of Their Discharges by the Hollywood
Club.**

The record shows that each of the players entered into a new contract for his services after being released by Hollywood. In the cases of Lilly and Dawson, cash bonuses in the respective amounts of \$500.00 and \$450.00 were received from the new employer and in the case of Barisoff a \$400.00 cash bonus was received at the end of the season. (The details on these payments and references to Record are enumerated in the Statement of Facts, *supra*.)

The Uniform Player's Contract provided that the employee would be paid only during such portion of the regular playing season as he was employed [R. p. 37, Contract Art. 2], and that the employee would not play in post-season games [R. p. 39, Contract Art. 4(b)]. During the 1946-47 contract year, player Lilly earned \$1,800.00 by playing for the Hermosillo team. Upon the testimony of the petitioners themselves as to their baseball earnings during the 1946-47 year, the trial Court found [R. p. 18] that the players had earned wages and/or salaries and/or bonuses which they would not have earned if they remained in the employ of the Hollywood Club. These figures were:

For Petitioner Barisoff	\$1,325.00
For Petitioner Dawson	\$1,583.50
For Petitioner Knudson	\$ 706.61
For Petitioner Lilly	\$3,855.00

The Selective Service Act entitles a veteran to a year's compensation; it does not establish a penalty against an employer. If then, the veteran procures other work after an improper discharge or refusal to re-employ, the wages thus received must be set off against any claim of compensation. *Hoyer v. United Dressed Beef Co.*, D.C. 1946, 67 Fed. Supp. 730, 734. Assuming that these petitioners did come within the reemployment provisions of Selective Service, Barisoff would have earned \$1,200.00 (6 months at \$200.00 per month), Dawson \$1,800.00 (6 months at \$300.00 per month), Knudson \$753.18 (6-6-46 to 9-29-46 at \$200.00 per month) and Lilly \$1,800.00 (6 months at \$300.00 per month) from the Hollywood Club. Both Barisoff's (\$1,325.00) and Lilly's (\$3,855.00) actual earnings exceeded their prospective compensation from Hollywood and they are in no event damaged. Knudson's actual earnings (\$706.61) fell only \$46.57 below his prospective compensation from Hollywood and Dawson's actual earnings (\$1,583.00) resulted in a loss to him of \$216.50.

This analysis is founded upon a consideration of the players' salary terms at the time of entry into service. Appellants argue that they are entitled to increases in salaries as shown by their post-war contracts. In this argument they blow hot and cold as they seek the benefit of the voluntary increases established by the contracts—but deny the effect of the termination clause contained in the same contracts. Upon uncontradicted evidence the Court found that the increased wages were based upon the right and privilege of the baseball club to terminate each reemployment contract [R. pp. 108, 20].

III.

The Petitioners Were Not Qualified to Perform the Duties of the Positions, Which They Held Temporarily Before Entry into Military Service, After Return From Such Service.

One seeking to obtain reemployment benefits under the Selective Service Act must be "qualified to perform the duties of such position." (Section 8(b) of Selective Training and Service Act of 1940, as amended.) The question of whether or not each of these veterans was so qualified presented an issue of fact for the trial Court. *McClayton v. Cassell Co.*, D. C. 1946, 66 Fed. Supp. 165; *Trusted Funds v. Dacey*, 160 F. (2d) 413, 420. The trial Court found specifically that each of the players was not so qualified at the time he sought reemployment [R. p. 22]. It is interesting to note that there is a paucity of testimony in favor of any qualifications by appellants, while the testimony on behalf of appellee that the players were not qualified is clear and positive [R. pp. 132-134, 146-151]. The trial Court, upon the consideration of the expert testimony of appellants' witnesses found that the veterans were not qualified. Counsel for appellants attempts to minimize the effect of such testimony by describing it as naked opinion unsupported by factual testimony; but it is submitted that the testimony offered was proper and of great probative value. Admittedly the Hollywood Baseball Club could not arbitrarily reach a decision that individual players were "not qualified" and thus bar them from reemployment rights. What it could do and did do was to obtain the impartial opinion of men

experienced in judging the qualifications of baseball players. These experts observed each of the players for a sufficient time to form an opinion as to their respective ability and qualifications, and this evidence was persuasive to the trial Court. Appellants make much of the failure of the expert witnesses to describe or define a "standard of play" with a mathematical nicety. If such a precise formula for judging baseball ability could be found, the finder would have something not yet known to the baseball world. Both Manager Fausett and Scout Thurston testified to the unreliability of statistics and to the need to depend on the intuition of experience in judging ball players. At most, the matters of statistics would go to the weight of the testimony offered.

A further contention is made to the effect that by signing the players to post-service contracts the Hollywood Club was estopped to deny that they were qualified. The doctrine of estoppel is not applicable in this situation because the signing of contracts in no way prejudiced the veterans. Furthermore the doctrine of estoppel may not be used as a sword to place the Hollywood Club in an unescapable dilemma; that is, to be charged with not testing the players' qualifications or be charged with having waived any shortcomings because of giving the opportunity to the players to show their ability. *Bryan v. Griffin*, 67 Fed. Supp. 714, 718. The matter of estoppel was not raised by the pleadings, at the trial, nor was it mentioned in "Appellants' Statement of Points on Which They Intend to Rely on Appeal" [R. pp. 159-161].

IV.

**The Hollywood Baseball Association's Circumstances
Had So Changed as to Make It Unreasonable to
Restore Appellants to Positions of Employment.**

In its Opinion the trial Court laid special emphasis upon the change in circumstances experienced by the Hollywood Club between the time appellants left for military service and when they sought reemployment. Judge Cavanah said:

“The evidence is undisputed that a higher and greater class and standard of qualifications for players in the Pacific Coast League had developed while the petitioners were not playing . . . and the statute authorized the respondent to refuse to reemploy the petitioners at the time in question.” [R. p. 15.]

Selective Service Act 50 U. S. C. A., App. 308(b) (3) (B) provides:

“If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay *unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . .*” (Italics added.)

There were two changes in the circumstances of the Hollywood Club which made it impossible and unreasonable to reemploy the appellants. *First*, during 1945 and while these veterans were in military service a change was made in the classification of the Pacific Coast League

raising it from an AA league to an AAA league. In such a higher classification a better and higher standard of baseball is played, higher salaries are paid and better ball players are used [R. p. 114]. It is a matter of common knowledge that for many years the Pacific Coast League has been striving for "Major League" status; the up-grading in classification in 1945 was one step in this transition. *Second* the national baseball rules limit the number of men which each team may have under contract at one time. During the war and at the time each of these players entered military service a team could have 30 players on its active list and 12 in reserve or a total of 42 ball players under contract. But at the time these appellants sought reemployment the national baseball rules limited each ball club to 25 players on its active list and 12 in reserve or a total of 37 players [R. pp. 116-119].

Both of these facts were of great importance to the Hollywood Club. Because of the improvement in the league's standard of play and the reduction in the number of players allowed, the pressure to select good players and to eliminate poor ones was intensified. It would have been considerably more than an "inconvenience" to require the Hollywood Club to rehire men who would have been "impossible or unreasonable," and thus within the exception set forth in the Selective Service Act.

V.

**Each of the Petitioners Was Discharged for Cause;
To-Wit, Inability to Play Baseball With Skill and
Ability.**

The matter of discharge for cause is closely connected with the determination of the veterans' qualifications to perform the duties of their positions. Again assuming, for the sake of argument, that the reemployment provisions of the Selective Service Act applied to these appellants, the statute also permitted a discharge for cause (Sec. 8(c)). *Basham v. Virginia Brewing*, D. C. 1946, 66 Fed. Supp. 718. Whether or not cause for discharge actually existed presented an issue of fact, and the Court found that each of the players lacked the skill and ability to perform the duties of his position [R. p. 23]. *Hoyer v. United Dressed Beef*, 67 Fed. Supp. 730, 732. A baseball player is a professional artist and the contracts under which these and all other professional baseball players are employed provide that "The Club hereby employs the Player to render skilled service as a baseball player" [R. p. 36, Contract, Art. 1].

Appellants' own appraisal of their ability is that they were "mediocre" players (App. Br. p. 47). On the other hand, the expert testimony was unanimous in the opinion that none of these players had the professional skill and ability to meet the standards of the Hollywood Baseball Club [R. pp. 132-134, 149-151]. While the expert witnesses testified that each had sufficient observation of the various players in training and practice games, the trial judge made close inquiry to satisfy himself that the manager and coach had rendered an honest and impartial judgment on the players' abilities [R. p. 139]. The finding of the trial Court after due and deliberate consideration of the testimony should not be disturbed on appeal.

VI.

Each of the Petitioners Waited an Unreasonable Length of Time From the Alleged Unlawful Discharge by Respondent in Which to Commence This Action and the Unreasonable Delay Prejudiced the Respondent.

The players were given releases by the Hollywood Club on the following dates: Barisoff, April 1, 1946; Dawson, April 15, 1946; Lilly, May 26, 1946, and Knudson, July 29, 1946 [R. p. 19]. The action was filed in the United States District Court on January 23, 1947, or 9 months and 23 days after Barisoff's release, 9 months and 8 days after Dawson's release, 7 months and 27 days after Lilly's release, and 5 months and 24 days after Knudson's release. Congress provided that cases involving reemployment rights under the Selective Service Act should be given priority of hearing. 50 U. S. C. A. App. 308(3). In the case of *Dacey v. Bethlehem Steel Co.*, D. C. 1946, 66 Fed. Supp. 161, it was held that a veteran had delayed an unreasonable length of time in enforcing his demands. The delay in the *Dacey* case was from October 1944 to July 1945—a period of nine months.

All of the players except Knudson were discharged at the beginning of the baseball season, but did not attempt to enforce their claims until long after the 1946 season ended. This delay on the part of petitioners did substantial prejudice to the respondent baseball club. In effect these appellants are attempting to get two years privileges under the Selective Service and Training Act instead of the one provided for in the statute. If the men had

brought an action and been restored to the ball club, they would have received their pay; since it was only a six months season that they would be entitled to be restored to, the obligations of the employer would then have been fulfilled. Now, two of the players, Dawson and Lilly, are seeking to be restored to their positions; and, in effect they are making it a two-year statute instead of the one-year statute which it is. That certainly is to the detriment of the Hollywood Baseball Club.

The trial Court found that each of the petitioners waited an unreasonable length of time from alleged unlawful discharge by the Hollywood Baseball Club in which to commence this action, and that the unreasonable length of time in seeking to enforce his demands has prejudiced the respondent [R. p. 23].

Conclusion.

Appellants' hope for relief is summarized on page 60 of their brief where it is stated, "The Act covers all employers, and exempts none." Such a broad statement is likely to lead to a misunderstanding of the limitations which are contained in the reemployment sections of the Selective Service Act. Actually, there are limitations based on fairness and practicality, and these limitations are expressly set forth in the statute. Appellee is not attempting to read implied exceptions into the word of Congress. Instead a dispute arose as to the factual circumstances surrounding the relationship between these appellants and the appellee. The issues were tried and decided in favor of the appellee and the findings establish

that the character of appellants' employment did not come within the language or intent of the Selective Service Act. Furthermore, it was found that the players suffered no loss of wages, were not qualified to perform the duties of their positions, were discharged for cause, and waited an unreasonable length of time before commencing this action, and that the circumstances of appellee had so changed as to make it unreasonable to require the restoration of appellants. Any one of the above findings would have required a decree for the respondent, and there is no ground for disturbing the decree entered by the trial Court.

Respectfully submitted,

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No. 11706

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT L.
DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF.

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Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF.

I.

Additional Authority on the "Hollywood Standards" Question.

United States v. Hibbard, 83 F. (2d) 785, 786 (9 C. C. A., 1936) is further authority that the judgment should be reversed for incompetent testimony, and should be added in Appellants' Brief at page 55.

In the *Hibbard* case, this Court reversed a judgment on a war risk insurance policy entered against the government by District Judge Charles C. Cavanah, because:

"The plaintiff's medical expert testified in response to a hypothetical question *in the form which has been so often condemned*, that in his opinion, the veteran was totally and permanently disabled prior to the time his policy lapsed in 1919. This error requires reversal." [See text and citations, 83 F. (2d) 783.]

The hypothetical question there condemned had at least the virtue of pertinency, since it called for the application of an established legal standard of disability. The hypothetical question here lacked even that virtue. No fixed standard was referred to by the phrase "play ball according to the standards of the Hollywood Club", and the questions and answers containing it were pure nebulae, or "no evidence" at all, as pointed out in Appellant's Brief at pages 54-56.

II.

The Brief of the Club Admits No "Hollywood Standards" Existed; and, Consequently, That the Phrase "Play Baseball in Accordance With the Standards of the Hollywood Club" Is Without Any Meaning Other Than Its Manager's "Intuition".

This phrase was originated by the Club's counsel in the trial. Over objection, he was permitted to use it in questioning his expert witnesses [R. pp. 133-137, 146-150, 152-154]; it was adopted in the District Court's Opinion [R. pp. 12-15 and 71 Fed. Supp. 493]; and was written into the District Court's findings prepared by the Club's counsel [R. p. 18]. The Club's own experts could not define what was meant by this phrase, under cross-examination; and each finally admitted that the test they applied was whether some other player was available whom they considered better for the team than the veteran released [R. pp. 134-137, 155].

Finally, on this appeal, the Club's Brief discloses what was the intended meaning of "Hollywood standards" question, as follows:

"Appellants make much of the failure of the expert witnesses to describe or define a 'standard of play'

with a mathematical nicety. If such a precise formula for judging baseball ability could be found, *the finder would have something not yet known in the baseball world.* Both Manager Fausett and Scout Thurston testified to the unreliability of statistics and to the need to depend on the *intuition of experience in judging ball players.*" (Club's Br. p. 21.)

We cannot agree with this statement, for two reasons pointed out below. But, at least, we have here at long last, the gist of the meaning of the phrase, as viewed by the Club. It says in effect:

"Intuition" not "standards" is meant. The phrase, to have any meaning, since no set standards are recognized in baseball, must be modified to read "play baseball in accordance with the *intuition of experience of the team manager* of the Hollywood Club."

On this matter of the *manager's intuition*, Judge Lloyd L. Black in *Niemiec v. Seattle-Rainier Baseball Club*, 67 Fed. Supp. 705 (D. C., Wash., 1946), said:

" . . . The employer may discharge at any time for cause, but *that cause must be something other than prediction or hunch of a manager.* And, where the baseball player and the manager disagree as to the actuality of the cause, in fairness and in accord with the American viewpoint, an independent tribunal must have a right to *hear the facts and see whether or not there be cause.* To allow the employer to decide that there will be cause in the future to discharge the employee presently is a far cry from the sportsmanship Americans the country over expect from baseball." (67 Fed. Supp. 712.)

For two reasons, we take exception to the implications of the Club's statement above quoted (Br. p. 21) because:

(1) The Club's experts were never requested to define standard of play in terms of performance statistics, *i. e.*, with "mathematical nicety". They were asked to define what they meant by the phrase "standards of the Hollywood Club", or of the Pacific Coast League. No such definition was given. We then undertook to find out whether any consideration had been given by them to the veterans' past and current performance records. None had been. Such records were available, but *emphatically* were not considered. Each finally stated that the actual test was merely his own judgment (now called "intuition") of the relative ability of the veterans as compared with another competing player, and that this was *absolutely the sole basis for the veterans' discharges*.

The Club's witnesses did not say the veterans were discharged *because* of Hollywood's alleged "standards"; but merely for the reason stated [R. pp. 134-137, 155].

(2) We are unable to agree that performance records have no place in determining a player's ability. If so, the baseball industry has been overselling the public on an erroneous thought throughout the years. Baseball clubs splash the sport pages of newspapers constantly with reports of the relative standing in a league of individual players in this or that line of baseball activity, the obvious premise being that the public will be led thereby to patronize games in which the leading players or teams are appearing, in the expectation that the players will

perform in future games in the manner in which they have done in the past. The public is not left with "intuition" as sole guide for investing their money in baseball tickets; and we suggest respectfully, this thought: Do the clubs really follow "intuition" alone in picking players? We doubt it.

Why, if the players it chose in preference to the veterans actually played better baseball than they, or if any better baseball was played by Hollywood or in the Pacific Coast League as a whole in 1946 than formerly, did the Club not *offer its records in hand to prove it*? And why, if the average player in the Pacific Coast League was any better than the veterans, were these figures not produced? Such figures would have been evidence, not mere "intuition" (*Niemiec* case, 67 Fed. Supp. at pp. 708-709, 712-713); and in view of the prior *Niemiec* decision (June 21, 1946), their absence is startling.

The Club had these figures, and a reason they were not produced may well have been that the veterans would not have suffered by the comparison.

Of course, the manager and coach may not have noticed the records when the veterans were discharged. But, in preparing this case for the trial later, it is difficult to assume *that Club's counsel did not examine those very records* to determine whether they contained evidence helpful to the Club. Their unexplained absence is itself evidence sufficient for an inference.

III.

The Club Cites No Testimony Which, in Any Way, Indicates the Veterans Did Not Possess Skill and Ability Sufficient to Play Baseball in Their Former Positions With the Club, Whether in the Pacific Coast League or Farmed Out. No One Testified They Did Not Play as Well as Formerly.

The burden of proving cause for discharge was on the Club.

Anderson v. Schouweiler, 63 Fed. Supp 802, at p. 808 (D. C., Idaho, 1945);

Hansen v. Columbia Breweries (N. C., 1942), 12 Wash. (2d) 254, 122 P. (2d) 489, 492.

The Club's Brief (p. 20) cites the Record at pages 132-134, 146-151, to support the District Court's finding on the veteran's ability; but nothing to the above effect was voiced by any witness in the pages so cited.

The sole question propounded by the Club's counsel to his witnesses was whether in their opinion the veterans had a degree of professional skill and ability "sufficient to equal the standards of the Hollywood Club."

Presumably the men were not unable to render the service they had rendered before; and no testimony was offered to counteract such presumption. (63 Fed. Supp. 808.)

When the Club's counsel finally finished his "standards of the Hollywood Club" questions, and permitted Manager

Faucett to state what was his individual opinion of the veterans' ability, in his own way, he said:

"In my opinion their ability didn't *equal* that of the men that they were competing with for *their particular position*." And that "was *absolutely* the sole basis" on which they were released. [R. pp. 134, 137.]

IV.

The Veterans Waived None of Their Statutory Re-employment Rights by Being Reinstated at Higher Wages.

The Club's Brief fails to cite any testimony supporting the finding, of which we complained in Specification I(d) (Applt. Br. p. 37) that the veterans' salaries on re-employment were negotiated figures "based on the right and privilege of the Respondent (Club) to terminate each such employment." [R. p. 20.]

Oscar Reichow, the sole witness whose testimony is cited by the Club in this regard, never mentioned the subject. [Club's Br. p. 19; R. pp. 108, 20.] He did affirmatively testify, however, that the ingrade salary increases were given all veterans pursuant to the rules of the National Association of Professional Baseball Leagues. This testimony negatives the idea of "negotiation" advanced by the Club. [R. pp. 120-121, 20.]

No "negotiations" about the amount of wages was mentioned by any witness whatever; and no "waiver" of

any rights appears in the restoration contracts themselves. [Exhibits Nos. 2, 6, 10, 15; R. pp. 163, 35-49.]

Aside from having no proof to support this finding, the Club abandons the language of the law in discussing this "waiver" defense, and its defense of "laches".

It recognizes, apparently, that the evidence does not bring this case within the scope of either of those doctrines; and, for manifest reasons, prefers to argue that the 1946 salary increases were "based on the right and privilege of Respondent to terminate the employment" and that the veterans "waited an unreasonable length of time to commence this action", rather than to argue directly that they "waived" their reemployment rights and were guilty of "laches". To use the true names of these defenses would at once announce their invalidity.

Because of the Club's circumlocution, and its failure to offer any proof whatever of waiver, that doctrine was overlooked in Appellants' Brief.

Waiver is inapplicable here for two reasons:

(a) Waiver is the voluntary relinquishment of a known right, which must be pleaded and proved. The Club (1) did not plead waiver and (2) offered no proof that the veterans voluntarily relinquished any part of their reemployment rights on restoration. The matter was never mentioned to them at all, orally or in writing, before or at the trial. [R. pp. 7-11, 108, 120-121.]

67 C. J. 294, 299, 302, 308, 309, 311, Waiver Secs. 2, 3, 6, 9, 11, 12.

“The intention to waive the right or advantage in question must be shown clearly and convincingly. The best evidence of intention is to be found in the language used by the parties. When the only proof of intention rests in what a party does or forbears to do, his acts or omissions to act relied upon should be so manifestly consistent with, and indicative of an intent to, voluntarily relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible.

“To establish waiver, it has been stated, the evidence must indicate a meeting of minds as well as the intentional forbearance to enforce the right in question.” (67 C. J. 311.)

(b) The STSA Sec. 8(c) forbids the employer to discharge a restored veteran without cause for one year; and the 1946 restoration contracts, despite Sec. 5(b) thereof, *did not give the Club the right to discharge restored veterans at will*, because:

(1) Sec. 11 of the restoration contracts modified Sec. 5(b) by providing:

“This contract is *subject to* federal or state legislation, regulations, executive or other official orders, or other governmental action, now or hereafter in effect, respecting military, naval, air or other governmental service, which may directly or indirectly affect the Player, the Club or the League;” . . . This proviso adopted STSA Sec. 8(c) and modified

Sec. 5(b) so as to forbid the Club to discharge the veterans for one year without cause.” [R. pp. 40, 42.]

Niemiec v. Seattle-Rainier Baseball Club, 67 Fed. Supp. 705, at pp. 707-709 (D. C., Wash., 1946).

(2) Regardless of Sec. 11, the same proviso as to the discharge at will clause would be deemed written into Sec. 5(b) by STSA Sec. 8(c) alone because:

“Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms.”

Northwest Steel R. Mills v. Com. Int. Rev., 110 F. (2d) 286 (9 C. C. A., 1940);

Farmers & M. Bank v. Fed. Res. Bank, 262 U. S. 649, 660, 63 S. Ct. 651 67 L. Ed. 1157, 1164;

Industrial Com. v. Aetna L. Ins. Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, 1343;

United States v. Dietrich, 126 Fed. 671, 675 (C. C., Nebr. 1904).

The invalidity of the Club's defense of “laches” (called by it the defense that the veterans “waited an unreasonable length of time to sue”) is pointed out in Appellants' Opening Brief (p. 51) *quod nota*; and the point that the Club is estopped by restoring the veterans to deny they were entitled thereto is covered there also (p. 50).

V.

The Club Now Admits That Baseball Players Hired Under the Uniform Players Contract Were Protected by the STSA Sec. 8, and Thus That the Niemiec Case, Not the Barisoff Case, Is Sound Law. But Its Effort to Distinguish the Niemiec Case on Its Facts Is Without Merit.

The Club was never satisfied with Judge Cavanah's holdings that baseball players have no reemployment rights under STSA Sec. 8; or that the change from a Class AA to a Class AAA league vacated any reemployment obligations of the Pacific Coast League clubs. These points, however, were the sole original bases of the judgment, as shown by the opinion filed March 11, 1947. [R. pp. 12-15.]

Not wishing to rely on these points, the Club prepared findings of fact, and secured Judge Cavanah's approval thereof, sustaining *all six points of its defense*, instead of the two passed on in the Court's opinion. [R. pp. 16-23.]

In this Court, the Club abandons the District Court's original two bases of decision with these words:

"Without debating the soundness of the *Niemiec* case, it is sufficient to state here that the evidence in the two cases distinguishes them." (Club's Br. p. 5.)

"Admittedly, the Hollywood Baseball Club could not arbitrarily reach a decision that individual players were 'not qualified' and thus *bar them from reemployment rights*." (Club's Br. p. 20.)

Which statement is opposed to Judge Cavanah's opinion, and in view of the nebulous "standards" testimony on

which the rest of the defense hangs, should dispose of the case here favorably to the veterans, without more.

The Club, however, tries to “distinguish” the *Niemiec* case on the ground that Niemiec was formerly a first string player and star, whereas, the veterans here were merely alleged “rookies being tried out for the Hollywood team”, when they were respectively inducted.

Just how the Club would have this Court distinguish between Al Niemiec, and Arthur M. Lilly who was drafted directly from the *Hollywood first string line-up*, we do not know. That fact is significantly omitted from the Club’s summary of facts. [Club’s Br. p. 12; App. Br. p. 29; R. pp. 62-63, 67, 163 and Ex. 5.]

Note this informative statement of the Club’s conception of a “temporary position” as applied to allegedly “untested” or “unproven” players (Club’s Br. p. 16), to wit:

“Those who are gifted go on to large financial success while others attain more moderate success, and many fall by the way. There are even varying degrees among those who fall by the wayside, *so that some last only a few weeks and others last a few seasons.*”

Imagine, still “temporary” after “a few seasons”.

Presumably, the Club means that only old-time stars hold “other than temporary positions” under the statute.

Essential facts are that Niemiec and Lilly were each formerly first string players, fired for the same identical alleged reason, that they did not, either of them, measure up to the supposed “standards” of their respective clubs on their return from service.

We cannot see even one legal minim of difference between the *Niemiec* and *Lilly* cases.

Neither are we able to distinguish under the statute between Niemiec and Knudson, the latter of whom had finished the baseball season immediately prior to his induction on the Hollywood active team and was under contract to report for play during the next season, also. [R. pp. 80-82.]

The status of Dawson and Barisoff as Hollywood employees at the times of their induction is covered in our opening brief (pp. 41-46) and needs no repetition here. They were not "probationary" or "temporary" in the Club's scheme of things. Certainly not "after several seasons". [R. pp. 31-33, 57, 91-94.]

The veterans were formerly all actively working for Hollywood in the positions assigned them by it. To argue they were not entitled to reemployment therein because they were not stars, or because two of them last worked in reserve positions [R. pp. 117-119], or because they did not immediately qualify in competition to fill first string positions on the active team on their return, is the same as arguing that a credit clerk is not entitled to his job back as such because he has not shown qualifications to fill the job of credit department manager. In the Club's jargon, anyone who had hope of rising to a department managership would hold merely a "temporary" or "probationary" position until he reached that high status.

VI.

Significant Omissions.

The Club's brief significantly omits any mention whatever of the National Defense Service List of the National Association of Professional Baseball Leagues under which the veterans were restored, and neglects to offer or suggest one legal precedent or reason to sustain the competency of its "Hollywood Club standards" question. These points were evidently better left untouched, in the Club's estimation. Certainly, they were not clarified for the Court by its brief.

VII.

**All of the Appellants' Specification of Errors
Complies With the Rules of the Court.**

Aside from the fact that no effective response was possible, the Club's omission to make any effort to discuss the competency of the "Hollywood standards" question and its brief reference to Appellants' point that the Club is estopped, by restoring the veterans, to deny they were qualified and are entitled to it, seem predicated on its complaint that:

"Apparently, the appellant seeks to enlarge the scope of this Court's review, for the Specification of Errors includes matters not set forth in the Statement of Points on which Appellants Intend to Rely."
(Club's Br. pp. 4-5.)

All the specifications of errors are pertinent and incidental to the points on appeal mentioned. The specification fully complies with the rules. "Points on appeal" were never intended as a substitute for a formal "specification of errors", unless voluntarily adopted by the ap-

pellant. The points on appeal were intended for use primarily in connection with designations by counsel of portions of the record to be printed, where less than the whole is to be called for. Here all the record was printed, save and except that the useless printing of repeated Uniform Players Contracts was dispensed with by stipulation. The record so designated and printed contains every shred of evidence material to any of the errors specified, the errors are all pertinent and incidental to the points on appeal, the Club is in no way embarrassed in the presentation of its response to any specification, and the procedure followed is in strict compliance with the rules of the Court. [R. pp. 159-164; App. Br. pp. 37-40.]

Rules 19(6) and 20(2d) of this Court;

Rules 46, 52(a, b), 75(a, d, i, l) of the Federal Rules of Civil Procedure.

It was unnecessary, under the rules, for the veterans to plead an estoppel based on their reemployment. The Club's answer denied "that the petitioners were reemployed in their former positions as required by law"; and there was no need, opportunity or authority for petitioners' to plead estoppel (avoidance) in the face of this negative pregnant. [R. p. 7.]

Rules 7(a) and 8(c) of the F. R. C. P., supra;

31 C. J. S. 445-448, Estoppel, Sec. 153-b(2, 3);

U. S. Fidelity & Guarantee Co. v. Wilson, 41 F. (2d) 319, 324-325 (8 C. C. A., 1930;

Note: 20 A. L. R. 76-81.

VIII.

Proper Computation Shows Each Veteran Did Suffer a Loss of Wages in 1946.

The Club's Brief admits that the Court's finding, to wit, that the veterans "lost no wages" in 1946 is based on a computation at merely their former salary rates (before military service), not at their 1946 salary rates; and in which all their extra income from bonuses or post-season work was credited to the Club, in diminution. [R. p. 18.]

See the Club's admission on this point at page 19 of its brief. The injustice and error in so doing in our opening brief, pages 31-32, 52-53.

The following table gives the loss suffered by each veteran in 1946, computed at his 1946 salary, less all earnings elsewhere in the 1946 league season, (1) without deducting any "bonus for signing" with another club, and then (2) deducting such bonus; and gives the page in Appellants' Opening Brief where the detailed computation of loss appears.

Veteran	(1) Loss Without Deducting Bonus	(2) Loss with Bonus Deducted	Shown in Opening Brief p.
Barisoff	\$ 862.50	\$ 462.50	28
Lilly*	630.00	130.00	31
Dawson	676.50	226.50	34
Knudson	374.91	374.91	36
	<hr/>	<hr/>	
Total	\$2,543.91	\$1,193.91	

*Lilly earned \$1,800 in postseason work not counted in this computation. (See Applt. Br. pp. 31-32.)

For additional authority that the increased salary that was, or should have been, given a veteran on reemployment, is the proper rate for computing his loss of wages, see *Parker v. Maynard Boyce, Inc.*, 74 Fed. Supp. 581, at pp. 582, 584 (D. C., So. Calif., 1946), which should be added to citations on page 52 of the Appellants' Brief.

IX.

The Errors of the District Court Specified by the Veterans Were All of Law; and Each Is Reviewable Here.

No statement of fact or testimony in Appellants' Brief is controverted by the Club's Brief. In fact, the latter appears to be in large part a skeletonized copy of portions of The Facts from our brief. The portions omitted in copying have chiefly to do with (a) the Club's and the veterans' relations on reemployment under baseball law and the National Association of Professional Baseball Leagues, (b) the incompetent question about "Hollywood standards", and (c) the computation of the veterans' loss of wages.

But, even as to the parts so skipped, the facts and testimony stated in Appellants' Brief are not disputed one whit by the Club; merely the legal conclusions drawn therefrom.

On this basis, we represent, as was our original aim, that a full statement of all the facts and testimony is accurately and impartially presented in Appellants' Opening Brief.

Only errors of law have been specified by the Appellants (Applt. Br. pp. 37-40); and all of them are reviewable here.

“When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.”

Rule 52(b), F. R. C. P.

When the District Court has made a “fundamental error” of law, and the findings (or more correctly, the legal conclusion) based thereon are “clearly erroneous”, such findings may be set aside, as not being supported by the evidence.

Borax Consolidated, Ltd. v. City of Los Angeles,
296 U. S. 10, 21, 56 S. Ct. 23, 80 L. Ed. 9, sus-
taining *City of Los Angeles v. Borax Consoli-*
dated, 74 F. (2d) 901 (9 C. C. A., 1935);

United States v. Hibbard, supra;

Rule 52(b), F. R. C. P., supra.

X.

**Baseball Is Not Exempt From the Common
Obligation to Reemploy Veterans.**

The admission by the Club (Br. p. 20) that neither baseball in general, nor Hollywood in particular, was exempt from the statutory obligation to restore their returning players would seem to settle that question for all purposes. But it is not inappropriate to observe, nevertheless, that neither the Club nor the Court's Opinion have disclosed how a baseball club, with the number of players under contract limited by association rule, is legally different from any business enterprise, the number of employees of which is limited by business economics just as effectively, and which is likewise highly competitive in its operations.

We repeat that baseball clubs are embraced in the congressional language "in the employ of any employer" appearing in STSA Sec. 8(b); that Sec. 5(b) of the Uniform Players Contract stands modified by Sec. 11 thereof, and by the law itself, so as to forbid by contract the discharge at will of a veteran for one year after his return, unless he gives legal cause for discharge; and that it is not unreasonable to require that Hollywood compete on equal terms with all other clubs which, willingly or unwillingly, obeyed the law as written.

Conclusion.

No good reason appears why the *Niemiec* case in full should not be adopted and applied by the Court; and if that is done, the veterans will be granted appropriate relief here.

Reference is again made to the veterans' original brief for the principal discussion of the facts and law of the case. The Reply Brief is intended merely to clarify some of the appellee's claims.

Respectfully submitted,

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No. 11707

United States
Circuit Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

vs.

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Transcript of Record
In Five Volumes
VOLUME I
Pages 1 to 468

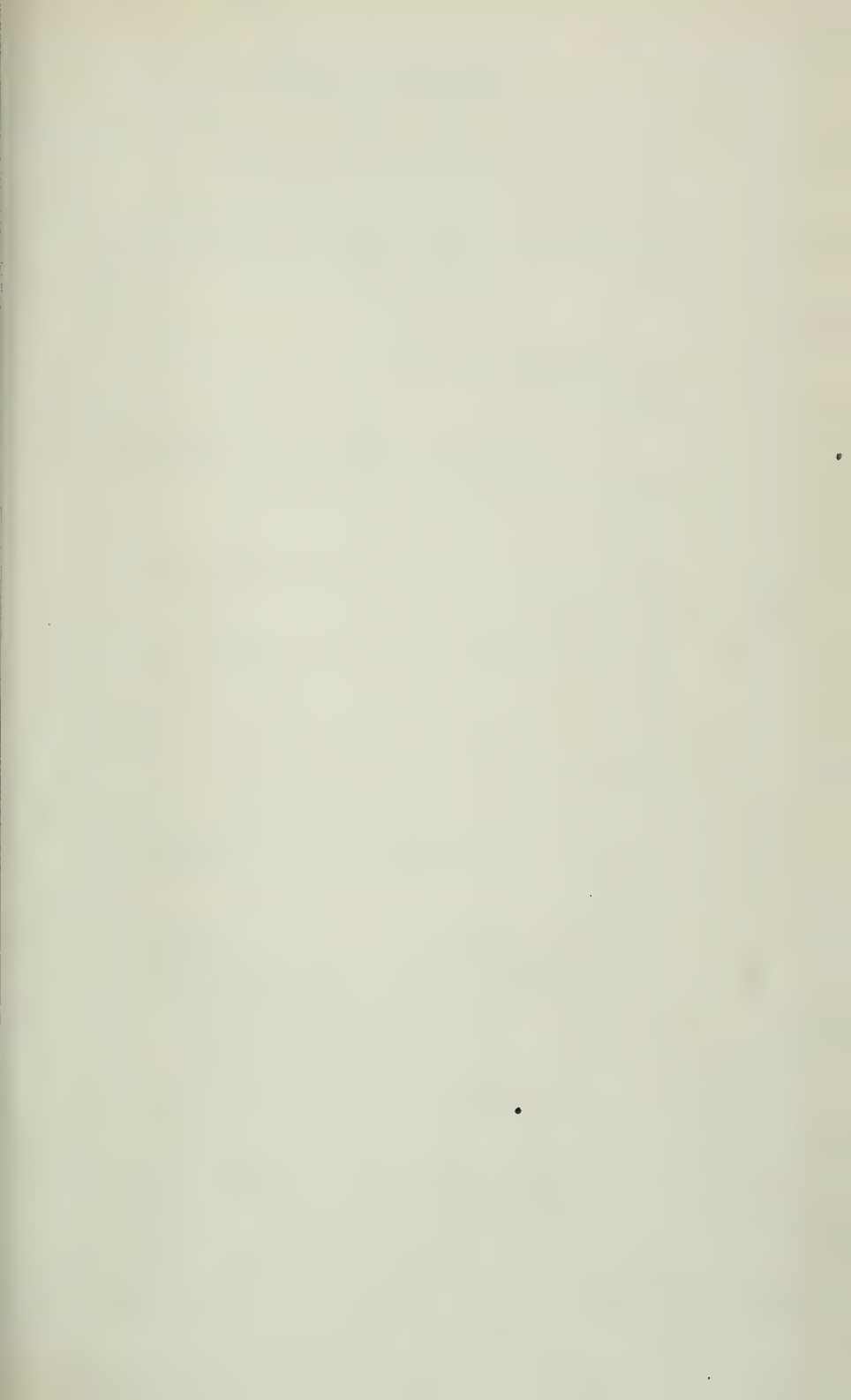
Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

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PAUL P. HERRING





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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tinental Casualty Company.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Civil No. 246

THE UNITED STATES OF AMERICA for the use of M. C. SCHAEFER, an individual doing business as Concrete Construction Company,
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J. GOERIG, and CLYDE PHILP, individuals and co-partners doing business as Macri Company, and CONTINENTAL CASUALTY COMPANY, a corporation,
Defendants.

AMENDED COMPLAINT

For cause of action against the defendants plaintiff alleges:

1.

This action is brought in the name of the United States of America as plaintiff for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c.642, Sections 1 and 2, 49 Statutes at Large 793, 794).

2.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon.

3.

That Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp are individuals and insofar as all matters herein referred to and material hereto are concerned, were co-partners doing business under the assumed name of Macri Company and Macri & Company, and are residents of King County, State of Washington, and said defendants are hereby referred to collectively as "Macri Company." [2*]

4.

That at all times herein mentioned the defendant Continental Casualty Company was and now is a corporation authorized to transact a surety business in the State of Washington.

5.

That on or about the 7th day of December, 1943, the United States of America through the Department of Interior, and the defendants Macri Company made and entered into a certain contract, being contract No. 12r-14825 for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sublaterals Roza Division, Yakima Project, Washing-

*Page numbering appearing at foot of page of original certified Transcript of Record.

ton, wherein and whereby said defendant contractors contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95.

6.

That on or about the 7th day of December, 1943, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of the work provided for in said contract, said Macri Company as Principal and the Continental Casualty Company, a corporation, as Surety, made, executed and delivered to the United States of America as obligee a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

7.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to hereinabove, and said contract was performed and executed at or near Yakima, Yakima County, in the Eastern District of the State of Washington. [3]

8.

That heretofore and on or about the 14th day of March, 1944, the defendants Macri Company,

writing their name "Macri & Company" entered into a subcontract in writing with the Concrete Construction Company wherein and whereby said Macri Company subcontracted to said Concrete Construction Company the following work "the furnishing of all labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel, all such work as shown on the plans and specified in the specifications No. 1062, Contract No. 12r-14825, Roza Division, Yakima Project, Washington." All of the excavating and all of the materials necessary for the performance of said subcontract by the Concrete Construction Company were to be furnished by the defendants Macri Company with the exception of form wire, nails and curing material, said excavating and said materials to be furnished, done and supplied in accordance with the plans and specifications above referred to and in proper time for the performance of said subcontract by the plaintiff Concrete Construction Company.

A copy of said subcontract is attached to the original complaint on file herein marked Exhibit "B" and by reference made a part hereof as though set forth in full herein.

9.

That pursuant to said subcontract above referred to said subcontractor Concrete Construction Company entered into the diligent performance of his said subcontract and commenced with the furnishing of labor and materials and the performance of services called for in said subcontract.

10.

That notwithstanding the defendant Macri Company's agreement to do the necessary excavation work and to furnish the necessary materials, with the exception of the form wire, nails and curing materials, and to construct and furnish the necessary roads for the timely, orderly and proper performance of plaintiff's subcontract, the defendants failed, neglected and refused from the beginning or at any time to perform such [4] excavating either on time or in accordance with the specifications of the Bureau of Reclamation and failed, neglected and refused from the beginning or at all to furnish materials of proper quality or of sufficient quantity and on time, in that said materials, and particularly the lumber, was used lumber, full of knot holes, broken, warped, dirty and unfit for use, was not furnished on time or in sufficient quantities to permit the plaintiff to perform his contract and the excavating work required to be done by the defendants was not done in time nor in accordance with the specifications of the Bureau of Reclamation.

11.

That immediately after the commencement of said work the plaintiff Construction Company, acting through M. C. Schaefer and its authorized representatives, complained to the defendants Macri Company concerning their failure to comply with their said agreement in the matters above set forth, whereupon the defendants Macri Company orally

requested the plaintiff Concrete Construction Company to nevertheless proceed with the work called for in said subcontract and orally requested the said plaintiff Concrete Construction Company to do and perform the extra work required because of said Macri Company's non-performance, and orally requested the said Concrete Construction Company to keep an account of said costs, and said Macri Company agreed that in consideration of the Concrete Construction Company's performing such extra services and continuing with the performance of said subcontract and with the doing of the work called for by said subcontract, notwithstanding Macri Company's inability and neglect to perform its part of said contract as herein specified, that Macri Company would pay the full costs of said work and the performance thereof irrespective of the subcontract price; that said Macri Company orally repeated said promises and assurances throughout the performance of said work by the Concrete Construction Company, and by reason thereof and in reliance thereon and pursuant to said agreement the Concrete Construction Company continued with said [5] subcontract and completed all of the work required thereby, incurring additional costs because of said Macri Company's neglect to perform his part of said contract as above set forth.

12.

That pursuant to said subcontract and to said oral agreement hereinabove set forth, the plaintiff Concrete Construction Company between the 14th

day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for said defendant Macri Company at their special instance and request of the reasonable and agreed value of \$90,233.53, an itemized list and statement of said work, labor, materials and services being attached to the original complaint on file herein and marked Exhibit "A" and by reference made a part hereof as though set forth in full herein.

13.

That the plaintiff Concrete Construction Company has made demand upon the defendants, and each of them, for payment of said sum, but that said defendants have failed, neglected and refused to pay the same except the sum of \$32,614.66, leaving a balance now due, owing and unpaid in the amount of \$57,618.87, which amount, together with interest at 6% to November 1, 1945, amounting to \$3,745.57, or a total of \$61,364.44, is now due and unpaid, of which amount \$57,618.87 draws interest at 6% per annum from November 1, 1945, until paid in addition to the interest herein set forth.

14.

That pursuant to the terms and provisions of said subcontract the plaintiff Concrete Construction Company in writing on November 13, 1944, demanded arbitration of the matters herein set forth, a copy of which demand is attached to the original complaint, marked Exhibit "C" and by reference

thereto made a part hereof as though set forth in full herein; that more than sixty days have elapsed since the request for such arbitration and no arbitration was ever had and no arbitration decision reached; that plaintiff Concrete Construction Company's claim has been presented to the defendants Maeri Company and said plaintiff's enter [6] claim rejected as being spurious.

15.

That more than ninety days have elapsed since the last of said work, labor and materials were furnished by said Concrete Construction Company as hereinabove set forth, and less than one year has elapsed since the complete performance and final settlement of said contract No. 12r-14825 was made. The final settlement and acceptance under said contract was made on March 31, 1945.

16.

That on or about December 1, 1945, the plaintiff, Concrete Construction Company notified the defendants, and each of them, that said plaintiff exercised his option under said subcontract to bring suit, no arbitration decision having been reached, and further notified said defendant that in any event arbitration was revoked, the following being a copy of said notice:

“In Mr. Schaefer's letter to you of November 13th in the eighth paragraph thereof, he requested arbitration of the matters in dispute as provided in clause 9 of the subcontract. Your

correspondence and the position you have taken subsequent to this request is in effect a refusal to arbitrate and you have apparently refused at all times to recognize any claim in Mr. Schaefer at all. In any event, more than sixty days have elapsed since Mr. Schaefer's first written request for arbitration and you are now notified that Mr. Schaefer in accordance with the provisions of said clause 9 exercises his option to bring suit upon the matter in dispute. You are further notified that in any event arbitration is revoked."

17.

The ground upon which the jurisdiction of this court is invoked is that the action arises under the Act of Congress referred to hereinabove which expressly directs the bringing of such action in this court to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the District in which said contract was to be and was performed and executed.

Alternative Second Cause of Action

In the alternative and in the event that the court shall determine that the defendants Macri Company did not orally agree under a valid [7] agreement to pay for the increased costs of the performance of said subcontract by reason of Macri Company's failure to perform its part of its contract, all as hereinabove alleged, plaintiffs allege for a second and alternative cause of action:

1.

Plaintiff alleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 as the first 11 paragraphs of plaintiff's second cause of action to the same effect as though re-set forth and re-alleged in full.

2.

That the reasonable value and cost of the materials required to be furnished and the labor and services required to be performed by the Concrete Construction Company in the performance of its said subcontract had Macri Company complied with the terms and provisions of its contract in the particulars hereinabove set forth would have been \$35,554.12.

That the reasonable cost and value of the materials required to be furnished and the labor and services required to be performed in the performance of the said subcontract by the Concrete Construction Company by reason of and because of said defendant Macri Company's nonperformance of its said contract in not furnishing the required lumber and materials of proper quality, quantity or at the proper times, in failing to furnish roads and in failing to do the excavating which was required to be done by the plaintiff in accordance with the Bureau of Reclamation specifications and sufficiently in advance of plaintiff's requirements and on time is \$90,233.53, to the plaintiff Concrete Construction Company's damage in the sum of \$57,618.87 by reason of said Macri Company's breach of and failure to perform its part of said subcontract.

3.

Plaintiff's re-allege paragraphs 13, 14, 15, 16 and 17 of plaintiff's first cause of action to the same extent and to the same effect as though re-alleged and set forth herein. [8]

Wherefore, Plaintiff prays that it have and recover judgment against the defendants, and each of them jointly and severally, for the use and benefit of M. C. Schaefer, doing business as Concrete Construction Company in the sum of \$61,364.44, together with interest on \$57,618.87 thereof from November 1, 1945, at 6% until paid on plaintiff's first cause of action, together with plaintiff's attorney's fees herein to be fixed by the court; or in the alternative that the plaintiff have and recover judgment against the defendants, and each of them jointly and severally for the use and benefit of M. C. Schaefer, doing business as Concrete Construction Company, in the sum of \$61,364.44, together with interest on \$57,618.87 thereof from November 1, 1945, at 6% until paid on plaintiff's second and alternative cause of action, together with plaintiff's reasonable attorney's fees herein to be fixed by the court, and that plaintiff further have and recover his costs and disbursements herein expended and incurred, and for such other and further relief as to the court may seem just and proper in the premises.

/s/ HARRY L. OLSON,

/s/ FRED C. PALMER,

Attorneys for Plaintiff,

[Endorsed]: Filed Jan. 24, 1946. [9]

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Come now the defendants Sam Macri, Don Macri and Joe Macri, and answering the first cause of action of the amended complaint of the plaintiff, admit, deny and allege as follows:

1.

Answering paragraph 1 thereof, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained, and therefore deny the same and demand proof thereof.

2.

Answering paragraph 2, these defendants admit the allegations therein.

3.

Answering paragraph 3, these defendants admit that these answering defendants, Sam Macri, Don Macri and Joe Macri, were at all times mentioned in the amended complaint herein co-partners and doing business as Macri & Co., also known and being the same entity as Macri & Company; deny that the defendants A. J. Goerig and Clyde Philp, or either of them, is now or ever was a member of said partnership; and allege that with respect to matters herein material the said partnership composed of these answering defendants d/b/a

Macri & Co. was a joint adventurer with the defendants A. J. Goerig and Clyde Philp under a written joint venture agreement dated December 11, 1943. [10]

4.

Answering paragraph 4, these defendants admit the same.

5.

Answering paragraph 5, these answering defendants admit that, together with their aforesaid joint adventurers, they made and entered into the certain written contract described in said paragraph 5, also designated as Specification No. 1062, but they deny with respect thereto that they contracted to furnish materials and perform work in accordance with said contract for any sums or amounts other than as determined by the terms and conditions of said contract, the bid submitted in furtherance thereof and the quantities of work determined and certified as performed by these answering defendants.

6.

Answering paragraph 6, these answering defendants admit that they, together with their aforesaid joint adventurers, furnished good and sufficient written bond as required by the aforesaid written contract, which bond is a public document in possession of the United States of America and is equally available to all parties litigant in this action ;

and that save and except as shown and stated by said original of executed bond these answering defendants deny each and every allegation, statement and thing contained in paragraph 6.

7.

Answering paragraph 7, these defendants admit the same and allege with respect thereto that said contract is a public document, equally available to all parties litigant in this action.

8.

Answering paragraph 8, these defendants admit the same except as hereinafter alleged.

9.

Answering paragraphs 9, 10, 11 and 12, these defendants deny the same.

10.

Answering paragraph 13, these defendants admit the sum of [11] \$32,614.66 was paid by these defendants to the use plaintiff, M. C. Schaefer, and further admit that there is owing to the use plaintiff an amount not in excess of \$1,449.88 by reason of use plaintiff's performance of the said subcontract, but these defendants deny that said amount is owing to the use plaintiff by these defendants except as hereinafter set forth in the cross-complaint of these defendants against the defendants A. J. Goerig and Clyde Philp, and further deny that these defendants agreed to pay interest on amounts coming due to the use plaintiff from these defendants.

11.

Answering paragraph 14, these defendants admit that no arbitration was ever had and no arbitration decision reached, but deny each and every other allegation thereof except as set forth in the affirmative defense of these defendants.

12.

Answering paragraph 15, these defendants admit the same.

13.

Answering paragraph 16, these defendants admit the receipt of the notice therein referred to, but deny the facts stated in said notice and further deny each and every other allegation of said paragraph 16.

14.

Answering paragraph 17, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained, and therefore deny the same and demand proof thereof.

15.

Answering the Alternative Second Cause of Action of the amended complaint of the plaintiff, these defendants admit, deny and allege as follows:

1.

Answering paragraph 1 thereof, these defendants realleged paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 hereinbefore set forth.

2.

Answering paragraph 2, these defendants deny each and every allegation [12] in said paragraph contained and the whole thereof.

3.

Answering paragraph 3, these defendants reallege paragraphs 10, 11, 12, 13 and 14 hereinbefore set forth.

Further answering said amended complaint and as an Affirmative Defense thereto, these defendants allege:

1.

That under and by the terms of the subcontract referred to in the plaintiff's amended complaint, wherein the use plaintiff is the subcontractor and these defendants and their aforesaid joint adventurers are the principal contractor, it is provided in Article Three, Section 9, thereof as follows:

“Arbitration 9: Should any dispute arise between Owner or the Principal Contractor and the Subcontractor as to the interpretation of plans and specifications, amounts to be allowed for additions or deductions, or as to time of completion, or as to any other matter in connection with the performance of this agreement, the disputed question shall, in the first instance, be decided by the Principal Contractor. Should such decision not be satisfactory to the Subcontractor, the disputed question shall be referred

to and decided upon by two competent arbitrators, skilled and experienced, one to be selected by each party hereto, and in case these two cannot agree, they shall select a third, and the decisions of any two of the three arbitrators shall be binding upon all parties. The arbitrators shall assess the cost and expenses of such arbitration against either or both parties as they may determine. Written notice, from either party of intention to arbitrate, shall be given wherever possible, within thirty days after the occasion for such arbitration arises, and in no case shall the work be stopped pending arbitration. In case of notice of arbitration, each party shall appoint his arbitrator within two weeks after such notice, and these two arbitrators shall either settle the question or select another arbitrator and thus settle the question within thirty days thereafter.

“The above arbitration shall be a condition precedent to any suit or action instituted in any Court, provided however that if a final decision has not been reached by the arbitrators within sixty days after the first written request for arbitration, either party may thereupon, and at his option, bring suit on the matter in dispute. Wherever permitted by law such decision may be filed in court to carry the same into effect.”

2.

That this action and the issues material hereto constitute a dispute which has arisen between the said principal contractor and the said [13] subcontractor as to matters in connection with the performance of said subcontract.

3.

That the use plaintiff has as yet failed to comply with Article Three, Section 9, of said subcontract above set forth, and that arbitration in accordance therewith has not yet been had hereon.

For a cross-complaint against the use plaintiff, M. C. Schaefer, these defendants allege as follows:

1.

That during all times hereinafter mentioned, the defendants Sam Macri, Don Macri and Joe Macri have been and now are copartners doing business under the assumed name and style of Macri & Co., also known and being the same entity as Macri & Company, with principal place of business at Seattle, King County, Washington, and with all said partners being residents of said City, County and State.

2.

That during all times hereinafter mentioned, the use plaintiff, M. C. Schaefer, was a sole trader doing business under the assumed name and style of Concrete Construction Company, with his principal place of business and residence in Portland, Multnomah County, Oregon.

3.

That heretofore, on or about December 7, 1943, these defendants entered into a written contract with the United States of America, through the Bureau of Reclamation, Department of the Interior, numbered 12r-14825, for the earthwork, pipe lines and structures, laterals 59.3 to 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, wherein and whereby the defendants contracted to furnish materials and perform work in accordance with the terms of said contract; that as required thereby defendants executed, as principal, with the Continental Casualty Company, a corporation, as surety, a good and sufficient written performance bond and payment bond; that said contract No. 12r-14825, with said Specifications No. 1062 and with the said performance bond and payment bond, is a [14] public document on file with the Department of the Interior, equally available to all parties litigant in this action. That said public document as so comprised was made available to and was inspected by the use plaintiff, M. C. Schaefer, prior to the execution of the subcontract next hereinafter described.

4.

That on or about March 14, 1944, in furtherance of and based upon the portion of the said contracted work under said principal contract, the use plaintiff, M. C. Schaefer, dealing as a sole trader under the name and style of Concrete Construction Company, entered into the subcontract referred to in para-

graph 8 of the amended complaint herein with the defendants. That under and by the terms of said subcontract the said M. C. Schaefer contracted

“to furnish all labor, and necessary equipment to do all the concrete work, formwork, cut, bend and install all reinforcing steel, all such work as shown on the Plans and as specified in the Specifications No. 1062 Contract No. 12r-14825, Roza Division, Yakima Project, Washington. Subcontractor shall strip and clean all concrete forms, remove nails from same and pile same in neat piles, after concrete has been poured in accordance with Plans, Specifications and Government Inspection and has had the proper time to set up. Forms at completion to be the property of the General Contractor.

“Time being the essence of this Contract the Subcontractor shall prosecute his work with a diligence and to the utmost of his ability and in a workmanlike manner.

“All materials except form wire, nails and curing material will be furnished by General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing material.

“Subcontractor will pay to the General Contractor \$42.00 for power hookup and 90 per cent of light and power bill unless it is elected to make use of separate meter setups.”

5.

That the use plaintiff, M. C. Schaefer, at the time of the execution of the said subcontract on or about March 14, 1944, represented to and urged upon these defendants that the use plaintiff had adequate equipment with which to subcontract for the performance of the additional work under the proposal being made by the United States of America, Department of Interior, Bureau of Reclamation, for work to be performed under contract specifications which later became a part of Contract No. 12r-14996 with Specifications numbered 1068, including [15] the schedules, specifications and drawings for earthwork, pipe lines and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima project, Washington; and the said use plaintiff, after the inspection in the field and the inspection of the said Specifications No. 1068 and the terms and conditions of the contract requirements for performance of the principal contract in connection with said Specifications No. 1068, represented to these defendants that said use plaintiff would perform the subcontracted work hereinafter more particularly specified, and that the said work would be conducted concurrently with the work being performed under aforesaid Specifications No. 1062 so that there would be no abatement of subcontract performance both under the aforesaid principal contract numbered 12r-14825 and under said pro-

posed contract numbered 12r-14996 if awarded to defendants. That as part of said representation the said use plaintiff, M. C. Schaefer, thereupon executed and delivered to these defendants form of subcontract under date of and executed April 21, 1944, and that by the terms of said subcontract the use plaintiff, M. C. Schaefer, specifically agreed

“to furnish all labor, and necessary equipment to do all the concrete work, formwork, structural timber work, cut, bend and install all reinforcing steel, all such work as shown on Plans and as specified in the Specifications No. 1068 Roza Division, Washington. Subcontractor shall clean all concrete forms, remove nails from same and pile same in neat piles. All forms and form lumber at completion of job shall remain the property of the General Contractor. All work shall be done in strict accordance with Plans, Specifications, Government Inspection and to the satisfaction of the General Contractor.

“All materials except form wire, nails and curing materials will be furnish by the General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing materials.

“General Contractor will furnish only form lumber to the Subcontractor.

“Time being the essence of this Contract the Subcontractor shall prosecute his work with a diligence and to the utmost of his ability and in a workmanlike manner.”

6.

That thereupon, and relying on said subcontract undertaking and the said [16] oral undertaking by the said use plaintiff that there would be a continuity of performance work under both the aforesaid Specifications No. 1062 and said Specifications No. 1068, these defendants made bid for and were awarded the principal contract for performance of the work called for by said Specifications No. 1068, which said contract was entered into between the United States of America, Department of Interior, Bureau of Reclamation, as principal, and the defendants, as contractor, on and dated May 18, 1944, the said contract being numbered 12r-14996 and providing for the performance of the earthwork, pipe lines and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima project, Washington, for the performance of the said contracted work according to the schedules, specifications and drawings under said Specifications No. 1068; that, as required thereby, defendants also executed as principal with the Continental Casualty Company, a corporation, as surety, good and sufficient written performance bond and payment bond; and that said contract, with the said Specifications No. 1068 and with the said performance bond and the said payment bond, is a public document on file with the Department of Interior, Bureau of Reclama-

tion, equally available to the use plaintiff and to the defendants and copies of which will be produced at time of trial of this suit. That said contract No. 12r-14996 provided that defendants might enter into subcontracts in carrying out the provisions thereof.

7.

That said subcontract on principal contract No. 12r-14996, Specifications No. 1068, entered into by and between these defendants and the use plaintiff, as aforesaid, provided that:

“Commence the work when directed by the Principal Contractor and thereafter prosecute it continuously and diligently to completion.

“Coordinate the work covered by this agreement with that of all other subcontractors and of the Owner and of the Principal Contractor. Use all reasonable means to avoid delay either in the work hereunder or in the work of others and cooperate with the Owner, the Principal Contractor and all other subcontractors to facilitate the completion of the entire work. The subcontractor shall be governed by such [17] orders as the Principal Contractor may give as to the time and sequence in which the component parts of the work shall be done. The Subcontractor shall not be entitled to any damages or additional compensation arising from, or because of any reasonable orders given or acts done by the Principal Contractor for the purpose of coordinating the work of all con-

tractors, subcontractors and material men. If the Subcontractor shall be delayed in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused; provided, however, that written notice of the fact and cause of such delay be given by the Subcontractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. The Subcontractor shall assume full responsibility for and indemnify the Owner and the Principal Contractor against all loss, cost and expense which may result from Subcontractor's delaying the progress or completion of the entire work."

8.

That the principal contract between defendants and the United States of America, being contract No. 12r-14996, Specifications No. 1068, paragraph 21, page 12, provided that:

"The contractor shall begin work within thirty (30) calendar days after date of receipt of notice to proceed and shall complete all of the work within three hundred (300) calendar days from the date of receipt of such notice. Delays due to National Defense orders made effective subsequent to the date of the bid will be considered to be delays caused by sets of the Government. * * *"

9.

That after completing the aforesaid respective contractual arrangements between defendants and the United States of America, Department of Interior, Bureau of Reclamation, defendants on or about the 28th day of June, 1944, commenced performance of the work called for by said contracts, respectively, and as part thereof directed the use plaintiff, M. C. Schaefer, to commence performance of the subcontracted work under the aforesaid contract No. 12r-14825, with the belief and full assurance that the said use plaintiff would perform in continuity and without break the subcontracted work under both that said contract and the other contract, No. 12r-14996. That, accordingly, these defendants on or about November 30, 1944, agreeable to the terms of the aforesaid subcontract of April 21, 1944, directed the use plaintiff, M. C. Schaefer, to commence performance of the work called for by said subcontract, such order having been given by letter of that date, the original [18] of which is in possession of said use plaintiff and a full, true and correct copy of which is hereunto attached, marked Exhibit "A," is now referred to and herein incorporated by reference as fully for all purposes as though here set forth at length.

10.

That the use plaintiff failed, neglected and refused to commence performance of said work provided for by said subcontract when directed to do

so by these defendants and failed to coordinate the work covered by said subcontract with the work of the other subcontractors and with the work of the defendants as principal contractor as required by the terms and provisions of said subcontract, and continued to fail, neglect and refuse to perform said work or any part thereof.

11.

That on the continuing failure of the use plaintiff, M. C. Schaefer, to commence and to carry on the performance of said subcontract of April 21, 1944, these defendants on or about January 3, 1945, notified said use plaintiff that defendants would take over and complete said subcontracted work, such notice having been made by letter dated January 3, 1945, the original of which is in possession of said use plaintiff and a full, true and correct copy of which is hereunto attached, marked Exhibit "B," is now referred to and herein incorporated by reference as fully for all purposes as though here set forth at length.

12.

That thereafter and on or about the 3rd day of January, 1945, these defendants did take over and commence performance of the work provided by the subcontract between these defendants and the use plaintiff; that on or about the 10th day of October, 1945, these defendants fully and completely performed the work required by said subcontract

between these defendants and the use plaintiff; and that these defendants have now fully performed all the work required by the principal contract between them and the United States Government, being contract No. 12r-14996, Specifications No. 1068.

13.

That these defendants and their agents, officers and all persons, firms [19] and corporations employed by these defendants as subcontractors other than the use plaintiff have fully kept and performed all the terms and conditions of their subcontract with the use plaintiff on their part to be kept and performed.

14.

That by reason of the failure of the use plaintiff to perform the work agreed to and provided for by the terms and conditions of said subcontract and by reason of his failure to coordinate the work covered by said subcontract with the work of the other subcontractors and with the work of these defendants as principal contractor, and by reason of his default under said subcontract and his breach thereof, these defendants herein suffered damages in the amount of \$40,000.00, which said damages and all of them are recoverable by these defendants under and pursuant to the terms of Article Three, paragraph 7, of the said subcontract between these defendants and the use plaintiff.

15.

That said subcontract provides:

“12: In any action brought by the Principal Contractors based upon this agreement or any part thereof, or as a result of any default in the performance of any of the terms or provisions thereof, the Subcontractor shall pay to the Principal Contractor an additional, reasonable amount as attorneys’ fees, whether the same proceed to be judgment or not, and this provision shall also apply to any suit on any bond furnished hereunder and to any action brought against the Owner’s property to foreclose any lien arising out of this agreement. Should the Principal Contractor fail to make payment in accordance with this agreement and the Subcontractor bring suit to enforce payment and secure judgment thereon, the Principal Contractor will pay, in addition to such judgment, a reasonable amount to be fixed by the Court as attorneys’ fees in connection with such suit.”

16.

That this is an action brought upon this agreement and as a result of a default of performance of the terms thereof by the use plaintiff; that by reason thereof these defendants are entitled to recover reasonable attorneys’ fees in this action; that \$3,500.00 is a reasonable amount to allow these defendants as attorneys’ fees herein. [20]

For a cross-complaint against the defendants, A. J. Goerig and Clyde Philp, these defendants allege as follows:

1.

That during all times hereinafter mentioned, Sam Macri, Don Macri and Joe Macri have been and now are copartners doing business under the firm name and style of Macri & Co., also known and being the same entity as Macri & Company, with principal place of business at Seattle, King County, Washington, all of said partners being residents of said City, County and State.

2.

That on or about December 11, 1943, these cross-complainants, Sam Macri, Don Macri and Joe Macri, copartners doing business as Macri & Co., as first party, entered into a written joint venture agreement with the defendant A. J. Goerig as second party and the defendant Clyde Philp as third party, under and by the terms of which the said defendants A. J. Goerig and Clyde Philp understood and agreed to assume and pay for the costs and charges of and to have the interests in the proceeds from performance of the principal contract described in paragraph 5 of the plaintiff's amended complaint and in the following paragraph hereof, upon the following basis: $47\frac{2}{3}\%$ to these cross-complainants as first party, 20% to the defendant A. J. Goerig as second party, and $32\frac{1}{3}\%$ to the defendant Clyde Philp as third party. That

a copy of the said written joint venture agreement is in the possession of the said defendants and demand for the production of said executed copy will be made herein, and when produced and filed will be incorporated as a part hereof by reference.

3.

That on or about December 7, 1943, the United States of America, acting by and through its Bureau of Reclamation, Department of the Interior, entered into a written contract with these cross-complainants, as copartners as aforesaid, and their aforesaid joint adventurers, said contract being designated No. 12r-14825, whereby these cross-complainants, as principal contractor under such co-partnership designation, agreed to perform the earthwork, pipe lines and structures, laterals [21] 59.3 to 69.8 and sublaterals, Roza Division, Yakima Project, Washington, based upon and governed by Specifications No. 1062, under and by the terms of which said contract these cross-complainants, acting as aforesaid, undertook and agreed to complete the worked called for thereby. That in all of the foregoing these cross-complainants acted for and on their own behalf and for and on behalf of their aforementioned joint adventurers, A. J. Goerig and Clyde Philp. That said contract No. 12r-14825, as above indicated, is a public document on file with the United States of America with aforesaid Bureau and Department, is equally available to all parties to this litigation, is required to

be produced and filed as a prerequisite to bringing this action by the use plaintiff, and when so filed and made available to the court is here incorporated by reference as an integral part hereof; and, further, that the work called for by said contract was in fact undertaken and completed by these cross-complainants.

4.

That, as required by the said contract No. 12r-14825, these cross-complainants, acting for the aforesaid copartnership and for their joint adventurers, executed as principal and the defendant Continental Casualty Company, a corporation, executed as surety the requisite payment and performance bonds as called for by said principal contract, the originals of which executed bonds are also filed with the United States of America with aforesaid Bureau and Department, are equally available to all parties to this litigation, are required to be produced and filed as a prerequisite to bringing this action by the use plaintiff, and when so filed and made available to the Court are here incorporated by reference as an integral part hereof.

5.

That under and by the terms of said joint venture agreement the defendants A. J. Goerig and Clyde Philp became indebted to and remain indebted to these cross-complainants, Sam Macri, Don Macri and Joe Macri, copartners as aforesaid, in amount greatly in excess of the total amount of \$1449.87

due the use plaintiff by reason of his performance of said subcontract, and in excess of the [22] total amount of \$61,364.44 and the interest thereon demanded by the use plaintiff in this action, by reason of the costs and charges borne and paid for by these cross-complainants in the performance of the principal contracts Nos. 12r-14825 and 12r-14996 hereinabove mentioned, over and above the share of the total costs and charges which said copartners were to pay under said joint venture agreement. That by reason of the foregoing, these cross-complainants are entitled to judgment against the said defendants A. J. Goerig and Clyde Philp, jointly and severally, in the amount of the use plaintiff's claim herein if the same is sustained, or in whatever amount is awarded the use plaintiff thereon.

6.

That on or about the 13th and 15th days of May, 1946, the United States of America, through its Department of Internal Revenue, caused to be served upon these defendants the notices of levy and notices of tax liens, copies of which are hereto attached and marked Exhibits "C" and "D", respectively, and warrants for distraint Nos. 46-3665, 46-3666, 46-9020, 46-0921, 46-0922, 46-0923, 46-4262, 46-4263, 46-4264 and 46-4265 against the use plaintiff, M. C. Schaefer, for unpaid taxes in the amount of \$10,224.95, due the United States of America, and that these defendants have concurrently made return on said levies consistent with the allegations

hereof. That by reason of said levies, the United States of America has a claim against said use plaintiff, prior to any which may be established by these defendants herein, which said claim of the United States of America being uncollectible, renders uncollectible and valueless any judgment these defendants may recover herein against the use plaintiff, M. C. Schaefer, on the cross-complaint of these defendants against said use plaintiff. That because of the foregoing, these defendants are entitled to judgment against the defendants A. J. Goerig and Clyde Philp imposing upon said defendants a share, as fixed by the aforesaid joint venture agreement, of the damages sustained by these defendants by reason of the default of the use plaintiff, M. C. Schaefer, as set forth in the said cross-complaint of these defendants against said use plaintiff and the insolvency and inability of said use plaintiff to satisfy a judgment in the amount to which [23] these defendants are entitled, or any amount whatsoever. And further, that the said indebtedness of the defendants A. J. Goerig and Clyde Philp to these cross-complainants, as above mentioned, exceeds the amount demanded by these cross-complainants of the use plaintiff, M. C. Schaefer, in the cross-complaint herein of these defendants against said use plaintiff, and by reason thereof these defendants are entitled to a judgment against defendants A. J. Goerig and Clyde Philp in the amount of the judgment awarded these defendants against the use plaintiff herein.

Wherefore, these defendants, Sam Macri, Don Macri and Joe Macri, copartners doing business as Macri & Co., pray judgment and relief as follows:

1. That the use plaintiff have and recover nothing against these defendants, and that the amended complaint herein be dismissed as to these defendants and that they have their costs and disbursements herein to be taxed.

2. That these defendants be awarded judgment against the use plaintiff, M. C. Schaefer, for the sum of \$40,000.00, together with interest thereon at the rate of six per cent per annum from the 3rd day of January, 1945, and for the further sum of \$3,500.00 attorneys' fees.

3. That based upon the cross-complaint herein against the defendants, A. J. Goerig and Clyde Philp, summons may now issue out of the above-entitled court directed to said defendants, A. J. Goerig and Clyde Philp, requiring the said defendants to appear and defend against the said cross-complaint within the time and in the manner required by law, and that judgment be awarded these defendants against the defendants A. J. Goerig and Clyde Philp, and each of them, jointly and severally, as follows:

(a) In an amount equal to the judgment, if any, awarded the use plaintiff in this action against these defendants, or, if such judgment be denied, that the amount of the judgment awarded the use plaintiff against these defend-

ants be apportioned also against the defendants A. J. Goerig and Clyde Philp to the extent and on the [24] basis specified in the joint venture agreement as above alleged in said cross-complaint herein.

(b) In the sum of \$40,000.00 or in whatever amount judgment herein is granted these defendants against the use plaintiff, or, in the event such judgment be denied, judgment against defendants A. J. Goerig and Clyde Philp in an amount equal to 20% and 32 $\frac{1}{3}$ %, respectively, of the amount of the judgment awarded these defendants on their cross-complaint against the use plaintiff herein.

4. That these defendants have such other and further relief as is just, the premises considered.

S. W. BRETHORST,
TOM W. HOLMAN,
THOMAS N. FOWLER,
WARREN L. DEWAR,

Attorneys for Defendants and Cross-Complainants
Sam Macri, Don Macri and Joe Macri.

United States of America,
State of Washington, County of King—ss.

Sam Macri, being first duly sworn, upon his oath states:

That he is one of the defendants and cross-complainants in the above-entitled action and makes this verification on behalf of himself and Don

Macri and Joe Macri, his co-defendants and co-cross-complainants herein; that he has read the foregoing answer and cross-complaint, knows the contents thereof and believes the same to be true.

SAM MACRI.

Subscribed and sworn to before me this 6th day of June, 1946.

[Seal] A. T. BATEMAN,
Notary Public in and for the State of Washington,
residing at Seattle.

EXHIBIT "A"

November 30, 1944

Concrete Construction Co.
1635 Southeast Eleventh Avenue
Portland 14, Oregon

Attention: Mr. M. C. Schaeffer
Gentlemen:

Re: Subcontract No. 1068, Roza Division, Washington; U. S. Reclamation Job Specification No. 1068.

With reference to the subcontract signed by you as subcontractor with Macri & Company as principal contractor, covering performance of a portion of the above contracted work and with reference also to the letter of September 18, 1944, from the United States Department of Interior, Bureau of Reclamation, to Macri & Company, a copy of which has been furnished to you, and with reference to

Section 8 of Article One of such subcontract, please note the following:

The undersigned as principal contractor under said United States Reclamation Job Specification No. 1068, Roza Division, Washington, laterals 701-801, etc., and diversion channels, hereby direct Concrete Construction Co. as subcontractor now to commence work on such principal contract and for the portion thereof covered by such subcontract.

A duplicate of this letter has been retained.

Very truly yours,

MACRI & COMPANY,

By /s/ SAM MACRI.

Registered Mail Return Receipt Requested.

EXHIBIT "B"

January 3, 1945

Concrete Construction Co.
1635 Southeast Eleventh Avenue
Portland 14, Oregon

Attention: Mr. M. C. Schaeffer
Gentlemen:

Re: Subcontract No. 1068, Roza Division, Washington; U. S. Reclamation Job Specification No. 1068.

Pursuant to Section 8 of Article I and to Section 7 of Article II of your above designated subcontract

with us and because of your failure to commence work as ordered by our registered letter to you of November 30, 1944, re above subcontract number, you are advised that we hold you to be in default, and, accordingly, have taken over and will perform, at your cost, the subcontract work undertaken by you by such above numbered subcontract.

Very truly yours,

MACRI & COMPANY,

By /s/ SAM MACRI.

SM:GN

Registered—Return receipt requested.

EXHIBIT "C"

Lien No. 9023. Form 68-A. Treasury Department,
Internal Revenue Service. Revised Oct. 1944.
United States of America, Collection
District, State of Washington.

Notice of Levy

To Macri Company

Sam Macri, Don Macri, & Joe Macri -P-

At Seattle, Washington.

You are hereby notified that there is now due, owing, and unpaid from M. C. Schaefer, DBA Concrete Construction Co. to the United States of America the sum of Ten Thousand Two Hundred Twenty-four and 95/100 dollars (\$10,224.95) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits in your possession and belonging to the aforesaid M. C. Schaefer, DBA Concrete Construction Co. and all sums of money owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Ten Thousand Two Hundred Twenty-four and 95/100 dollars (\$10,224.95) of the amount now owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Tacoma, Washington, this 7th day of May, 1946.

[Seal] RALPH A. NOERENBERG, EJS
Collector of Internal Revenue,
Deputy Collector in Charge.

Form 668—Rev. Nov. 1943. Treasury Department, Internal Revenue Service. United States Internal Revenue,District of Washington, May 7, 1946.

No. 9023

Notice of Tax Lien(s) Under Internal Revenue Laws

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that

may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer M. C. Schaefer, DBA Concrete Construction Co.

Residence or place of business

Nature of Tax	Year or Taxable Period Ended	Date Assessment		Amount of Assessment
		List Received	List Signed	
Withholding Tax.....	Qtr. 6-30-45	8/20/45	I	\$ 10.00
Withholding Tax.....	Qtr. 6-30-45	7/16/45	T	1,713.60
			T	1,864.42
Withholding Tax.....	Qtr. 12-31-44	2/8/45	I	10.00
			T	3,230.03
Withholding Tax.....	Qtr. 3-31-45	5/24/45	I	10.00
		List Received	T	594.32
Employment Tax—FICA.....	Qtr. 3-31-45	5/18/45	I	1.07
			T	297.84
Employment Tax—FICA.....	Qtr. 6-30-45	10/1/45	I	2.22
			T	27.47
Employment Tax—FUTA.....	Year 1943	5/18/45	I	2.11
			T	261.13
Employment Tax—FUTA.....	Year 1944	5/21/45	I	4.52
Income Tax.....	Year 1943	8/28/45	T	560.42
Income Tax.....	Year 1944	7/10/45	T	564.94
		Filing Fee		.50
Total.....				\$9,154.59

RALPH A. NOERENBERG,
Deputy Collector in Charge
Collector.

Certificate of Officer Authorized by Law to Take Acknowledgments
State of Washington,
County of Pierce—ss.

Before me, this day personally appeared Ralph A. Noerenberg, to me
well known and well known by me to be the person described in and who
executed the foregoing instrument as Collector of Internal Revenue for
the Collection District of Washington; and he acknowledged
before me that he executed the same as such Collector of Internal Revenue,
and for the purpose herein expressed.

Witness my hand and official seal at Tacoma, Washington, in the
County and State aforesaid, this 7th day of May, 1946.

2 copies—Clerk of United States District Court

To Auditor of King County

[Seal]
Notary Public

EXHIBIT "D"

Lien No. 9023. Form 668-A. Treasury Depart-
ment, Internal Revenue Service. Revised Oct.
1944. United States of America, Col-
lection District, State of Washington.

Notice of Levy

To **Macri Company**

Sam Macri, Don Macri, Joe Macri, A. J. Goerig,
& Clyde Philp -P-

At Seattle, Washington

You are hereby notified that there is now due,
owing, and unpaid from M. C. Schaefer, DBA Con-
crete Construction Co. to the United States of
America the sum of Ten Thousand Two Hundred
Twenty-four and 95/100 dollars (\$10,224.95) as
and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid M. C. Schaefer, DBA Concrete Construction Co. and all sums of money owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Ten Thousand Two Hundred Twenty-four and 95/100 dollars (\$10,224.95) of the amount now owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Tacoma, Washington, this 7th day of May, 1946.

[Seal] RALPH A. NOERENBERG, EJS
Collector of Internal Revenue,
Deputy Collector in Charge.

Form 668—Rev. Nov. 1943. Treasury Department. United States Internal Revenue,District of Washington, May 7, 1946.

Notice of Tax Lien(s) Under Internal Revenue Laws

Pursuant to the provisions of Sections 3670, 3671. and 3672 of the Internal Revenue Code of the United States. notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that

may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer M. C. Schaefer, DBA Concrete Construction Co.

Residence or place of business

Nature of Tax	Year or Taxable Period Ended	Date Assessment		Amount of Assessment
		List Received	List Signed	
Withholding Tax.....	Qtr. 6-30-45	8/20/45	I	\$ 10.00
Withholding Tax.....	Qtr. 6-30-45	7/16/45	T	1,713.60
			T	1,864.42
Withholding Tax.....	Qtr. 12-31-44	2/8/45	I	10.00
			T	3,230.03
Withholding Tax.....	Qtr. 3-31-45	5/24/45	I	10.00
		List Received	T	594.32
Employment Tax—FICA.....	Qtr. 3-31-45	5/18/45	I	1.07
			T	297.84
Employment Tax—FICA.....	Qtr. 6-30-45	10/1/45	I	2.22
			T	27.47
Employment Tax—FUTA.....	Year 1943	5/18/45	I	2.11
			T	261.13
Employment Tax—FUTA.....	Year 1944	5/21/45	I	4.52
Income Tax.....	Year 1943	8/28/45	T	560.42
Income Tax.....	Year 1944	7/10/45	T	564.94
		Filing Fee		.50
Total.....				\$9,154.59

RALPH A. NOERENBERG,
Deputy Collector in Charge
Collector.

Certificate of Officer Authorized by Law to Take Acknowledgments
State of Washington,
County of Pierce—ss.

Before me, this day personally appeared Ralph A. Noerenberg, to me well known and well known by me to be the person described in and who executed the foregoing instrument as Collector of Internal Revenue for the Collection District of Washington; and he acknowledged before me that he executed the same as such Collector of Internal Revenue and for the purpose herein expressed.

Witness my hand and official seal at Tacoma, Washington, in the County and State aforesaid, this 7th day of May, 1946.

2 copies—Clerk of United States District Court

To Auditor of King County

[Seal]

.....
Notary Public

[Endorsed]: Filed June 7, 1946.

[Title of District Court and Cause.]

ANSWER

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for answer to plaintiff's complaint, admit, deny and allege as follows:

1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants deny each and

every allegation therein contained and particularly deny that these answering defendants were associated with Sam Macri, Don Macri or Joe Macri as co-partners or otherwise. These answering defendants allege that any relationship between these answering defendants and any of said other defendants named was terminated prior to the incurring of the liability, if any, alleged in plaintiff's complaint.

3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants deny each and every allegation therein contained. [32]

6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff for their costs and disbursements taxable by law.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants, A. J. Goerig and Clyde Philp.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Plaintiff.

[Endorsed]: Filed July 2, 1946. [33]

[Title of District Court and Cause.]

CROSS-COMPLAINT

Comes now the defendants Clyde Philp and A. J. Goerig and for a cross-complaint against Sam Macri, Joe Macri and Don Macri, admit, deny and allege as follows:

1.

These answering defendants and Sam Macri, Joe Macri and Don Macri, three of the above named defendants, heretofore entered into an agreement absolving these answering defendants of any liability alleged in plaintiff's complaint on file herein.

2.

In the event judgment be entered against these answering defendants, these answering defendants by virtue of said agreement are entitled to judgment over and against Sam Macri, Joe Macri and Don Macri in the amount of such judgment.

Wherefore, these answering defendants pray that in the event judgment be entered against these answering defendants in favor of the plaintiff that they be given judgment over and against Sam Macri, Joe Macri and Don Macri in the amount of such judgment, together with these answering de-

fendants' costs and disbursements taxable by law.

NAT U. BROWN,
KENNETH C. HAWKINS,
Attorneys for defendants
Clyde Philp and
A. J. Goerig

Service accepted and copy received of the foregoing cross-complaint this 28th day of March, 1946.

BRETHORST, HOLMAN,
FOWLER & DEWAR,
S. W. BRETHORST,
TOM W. HOLMAN,
THOMAS N. FOWLER,
WARREN L. DEWAR

[Endorsed]: Filed July 2, 1946. [35]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Come now the defendants, A. J. Goerig and Clyde Philp, and in compliance to the Motion to Make More Definite and Certain, furnish the following information:

1.

The agreement alleged in paragraph 1 of these defendant's cross-complaint was in writing, and a copy thereof is attached hereto.

2.

An accounting between these defendants and the defendants, Sam Macri, Don Macri and Joe Macri, shows or will show a substantial amount in favor of these defendants, A. J. Goerig and Clyde Philp, over and above the amount claimed in this case and in any other litigation in which these individuals are parties.

3.

In accordance with the terms of said agreement, and in view of the fact that the balance in accounting between the parties is in favor of A. J. Goerig and Clyde Philp in excess of the amounts claimed in this litigation and all other litigations in which these individuals are parties, the claims of the plaintiff in this case are collectible solely from defendants, Sam Macri, Don Macri and [36] Joe Macri, and as alleged in these defendants' cross-complaint these defendants are absolved from any liability, if any, as alleged in use plaintiff's complaint on file herein.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorney for defendants A. J.
Goerig and Clyde Philp.

Agreement Terminating Joint Venture

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig & Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

- (1) A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building, 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.
- (2) Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.
- (3) Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sub-laterals and Diversion Channels. Roza Division, Yakima Project, Washington.

- (4) Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.
- (5) The work to be done on Project 9536, Contract W7412-eng-1, duPongRPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Sub-contract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4), and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result $52\frac{1}{3}\%$ thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

(2) As to Project (5), this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to re-

ceive all profits that may come, arise or grow in connection therewith, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same. [39]

(3) Second parties shall pay to first party, as soon as the amount is ascertained, the equipment rentals for first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties upon Project (5), as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on said Project (5).

(4) In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project (1), known and designated as "Val Vue Real Estate Development."

(5) It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second

parties upon Project (5) are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00, is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

(6) It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified. [40]

(7) It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion or diversions of the

funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

(8) It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in a spirit of co-operation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

(9) In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties shall sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, concurrently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such

until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,

By DON MACRI,

One of Said Firm, But Authorized to Act in This Matter for It,

First Party.

CLYDE PHILP,

A. J. GOERIG,

Individually and d/b/a Goerig & Philp and/or A. J. Goerig Construction Co.,

Second Parties.

[Endorsed]: Filed July 5, 1946. [42]

[Title of District Court and Cause.]

REPLY TO ANSWER AND CROSS-COM-
PLAINT OF SAM MACRI, DON MACRI,
AND JOE MACRI

Come now A. J. Goerig and Clyde Philp for reply to the answer and cross-complaint of Sam Macri, Don Macri and Joe Macri, admit, deny and allege as follows:

1.

For reply to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of said defendants' answer these

replying defendants deny each and every allegation therein contained except as specifically admitted in these replying defendants' answer and cross-complaint.

2.

For reply to paragraphs 1, 2 and 3 of said defendants' answer to the alternative second cause of action of the amended complaint of the use plaintiff these replying defendants deny each and every allegation therein contained, except as specifically averred in these replying defendants' answer and cross-complaint.

3.

For reply to paragraphs 1, 2 and 3 of said defendants' affirmative defense these replying defendants deny each and every allegation therein contained, except as specifically averred in these replying defendants' answer and cross-complaint.

4.

For reply to paragraphs 1, 2, 3, 4, 5 and 6 of the cross-complaint against defendants A. J. Goerig and Clyde Philp these replying defendants deny each and every allegation therein contained and particularly deny the allegations of paragraph 2 and aver that said joint venture agreement referred to therein was terminated long prior to the incurrence of the liability referred to in plaintiff's complaint, and particularly deny the allegations of paragraph 5 and allege that pursuant to said agreement and the agreement terminating the same, said defendants

A. J. Goerig and Clyde Philp were absolved of all liability. That an accounting between these replying defendants and said defendants Sam Macri, Don Macri, and Joe Macri, will show that said defendants are indebted to these replying defendants in an amount substantially in excess of the amounts claimed in these proceedings.

Wherefore, these replying defendants pray that the answer and cross-complaint of the defendants, Sam Macri, Don Macri and Joe Macri be dismissed and that these replying defendants go hence with their costs. These replying defendants further pray that the defendants, Sam Macri, Don Macri, and Joe Macri, account to these replying defendants and to the court and furnish an accounting and that the court find that the said defendants are indebted to these replying defendants in an amount substantially in excess of the amounts claimed in these proceedings, and that upon such finding further find that these replying defendants are absolved of any and all liability.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants, A. J. Goerig and Clyde Philp.

[Endorsed]: Filed July 5, 1946. [44]

[Title of District Court and Cause.]

ANSWER OF CONTINENTAL CASUALTY
COMPANY

Comes now the defendant Continental Casualty Company above named, a corporation, and answering the first cause of action of the complaint of the plaintiff, admits, denies and alleges as follows:

1.

Answering paragraphs 1 and 2 thereof, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraphs contained and, therefore, denies the same and demands proof thereof.

2.

Answering paragraph 3, this defendant admits that the defendants Sam Macri, Don Macri and Joe Macri are copartners doing business as the Macri Company. This defendant alleges that the defendants A. J. Goerig and Clyde Philp were joint adventurers with the defendants doing business as Macri Company with respect to the matters herein material.

3.

Answering paragraph 4, this defendant admits said paragraph.

4.

Answering paragraph 5, this defendant denies said paragraph.

5.

Answering paragraph 6, this defendant admits that it, together with said Macri Company as principal and it is surety, furnished a good [45] and sufficient written bond as required by a certain written contract described in paragraph 5, which bond is a public document in possession of the United States of America and is equally available to all parties litigant in this action, and that save and except as shown and stated by said original and executed bond this answering defendant denies each and every allegation, statement and thing contained in paragraph 6.

6.

Answering paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, this defendant denies each and every allegation in said paragraphs contained.

Second Cause of Action

1.

Answering paragraph 1 of the second cause of action, this defendant adopts the same answers made in the first cause of action to the paragraphs therein referred to and makes the same a part hereof.

2.

Answering paragraphs 2 and 3 of the second cause of action, this defendant denies each and every allegation in said paragraphs contained.

First Affirmative Defense

Further answering said Amended Complaint and by way of first affirmative defense thereto, this defendant, Continental Casualty Company, alleges that in the application made for its bond, referred to in plaintiff's complaint, the defendants Macri, doing business as Macri Company, specifically undertook and agreed in their written application to save harmless and indemnify the Continental Casualty Company against any and all loss, liability and cost on its bond and that in the event that a judgment is entered in favor of the plaintiff herein against this defendant that this defendant should be subrogated to all rights of the plaintiff in said judgment against each of the defendants, other than this answering defendant. [46]

Wherefore, having fully answered plaintiff's complaint, this defendant prays that the same be dismissed and that it have and recover its costs herein incurred, and further prays that in the event a judgment is entered in favor of plaintiff and against this defendant that this defendant be subrogated to all rights of the plaintiff in said judgment against each of the other defendants, and that this defendant have a judgment against each of the other defendants for the full amount of said judgment and for all costs expended herein, including its reasonable attorney's fees, and that this defendant have such other and further relief as to the court may seem meet and proper.

/s/ EUGENE D. IVY,
Attorney for Defendant, Continental Casualty
Company.

State of Washington,
County of Yakima—ss.

Eugene D. Ivy, being first duly sworn, on oath deposes and says:

That he is the attorney for the defendant Continental Casualty Company above named; that he has read the above and foregoing Answer of Continental Casualty Company, knows the contents thereof, and believes the same to be true; that he makes this verification for and on behalf of the said defendant, being authorized so to do, and that no officer of said defendant is present in Yakima County.

/s/ EUGENE D. IVY.

Subscribed and sworn to before me this 16th day of July, 1946.

[Seal] JOHN GAVIN,
Notary Public in and for the State of Washington,
Residing at Yakima.

[Endorsed]: Filed July 25, 1946. [47]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF DEFENDANTS CLYDE PHILP AND A. J. GOERIG

Come Now the defendants Sam Macri, Joe Macri and Don Macri and answering the cross-complaint of the defendants Clyde Philp and A. J. Goerig, deny each and every allegation therein contained and the whole thereof.

Wherefore, having fully answered, these defendants pray for judgment dismissing said cross-com-

plaint, and further for judgment as prayed for in the answer and cross-complaint of these defendants on file herein.

BRETHORST, HOLMAN,
FOWLER & DEWAR,
TOM W. HOLMAN,
S. W. BRETHORST,
THOMAS N. FOWLER,
WARREN L. DEWAR,

Attorneys for Defendants Sam Macri, Joe Macri
and Don Macri.

United States of America,
State of Washington,
County of King—ss.

Sam Macri, being first duly sworn, upon his oath states: That he is one of the defendants in the above-entitled action and makes this verification for himself and on behalf of his co-defendants Joe Macri and Don Macri; that he has read the foregoing answer to cross-complaint, knows the contents thereof and believes the same to be true.

SAM MACRI.

Subscribed and sworn to before me this 17th day of September, 1946.

A. T. BATEMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy Received Sept. 21, 1946.

NAT U. BROWN,

Of Attys. for Goerig & Philp.

[Endorsed]: Filed Sept. 24, 1946. [48]

[Title of District Court and Cause.]

AMENDED REPLY AND CROSS-COMPLAINT
TO CROSS-COMPLAINT OF DEFEND-
ANTS MACRI

Comes now the plaintiff and replying to the answer and cross-complaint of the defendants, Sam Macri, Don Macri and Joe Macri against the plaintiff, admit, deny and allege as follows:

1.

For reply to paragraphs 1, 2, 3 and 4 of said defendants' cross-complaint, plaintiff admits the same, except that plaintiff denies the last sentence of paragraph 3.

2.

For reply to paragraph 5 of defendants' said cross-complaint plaintiff admits that he had adequate equipment with which to subcontract for the performance of the additional work therein referred to; that said work was to be conducted concurrently with the work to be performed under specifications 1062 and that the subcontract dated April 21, 1944, was executed, and except as so admitted plaintiff denies each and every other matter and fact in said paragraph contained.

3.

For reply to paragraph 6 of defendants' said cross-complaint plaintiff admits that the contract dated May 18, 1944, in said paragraph referred to

was executed and that the performance bond and payment bond therein referred to was [49] executed, and except as so admitted plaintiff denies each and every other allegation in said paragraph contained.

4.

For reply to paragraphs 7 and 8 of defendants' said cross-complaint the plaintiff admits the same except insofar as the original of said contract may differ from the quotations in said paragraphs contained.

5.

For reply to paragraph 9 of said defendants' cross-complaint plaintiff admits that it received the letter referred to as Exhibit "A" and except as so admitted denies each and every other allegation in said paragraph contained.

6.

For reply to paragraph 10 of said defendants' cross-complaint plaintiff denies the same and all thereof.

7.

For reply to paragraph 11 of said defendants' cross-complaint plaintiff admits the receipt of the letter referred to as Exhibit "B" and except as so admitted, denies every other allegation in said paragraph contained.

8.

For reply to paragraph 12 of said defendants' cross complaint plaintiff admits that the said de-

fendants unlawfully took over the performance of the work provided for in the subcontract and said cross-complaint referred to without tendering performance of said contract in accordance with said subcontract to the plaintiff, and except as so admitted denies each and every other allegation in said paragraph contained.

9.

For reply to paragraphs 13 and 14 of said defendants' cross-complaint said plaintiff denies the same and all thereof.

10.

For reply to paragraph 15 of said defendants' cross-complaint plaintiff admits the same except as to any inaccuracies as may be shown by comparison with the originals of said subcontract. [50]

11.

For reply to paragraph 16 of said defendants' said cross-complaint plaintiff denies the same and all thereof.

12.

Said plaintiff generally denies all of the allegations of said answer and cross-complaint that are inconsistent with or contrary to the allegations of plaintiff's complaint.

Further Replying to the said answer and cross-complaint of the said defendants as to the plaintiff, plaintiff alleges:

1.

That under and by virtue of the contracts referred to in the cross-complaint of said defendants Macri and as a condition precedent to the performance of the work and the furnishing of materials by the plaintiff Schaefer, the defendants Macri were to do and perform all excavating work for the installation and placing of the concrete work and to furnish the form lumber therefor. That notwithstanding their said contract obligation with reference to said excavation work and the furnishing of said form lumber, the said defendants Macri wholly failed and refused to perform said excavation work or to furnish said form lumber or to in any particular perform their part of said contract or tender performance thereof to enable the plaintiff Schaefer to proceed with the performance on his part of his part of said subcontract; that the said plaintiff Schaefer at all times stood ready, able and willing to perform his part of the said subcontract upon the performance by the defendants Macri of their part of said contract necessary and required to be performed by them as the condition precedent to the commencement of work by the plaintiff Schaefer; that notwithstanding said fact and without ever tendering plaintiff performance on the part of said defendants Macri of their part of said contract, the said defendants Macri without just cause or excuse thereof and in violation of their said contract unlawfully took over the work called for in said subcontract to the exclusion of the plaintiff.

Further replying to said answer and cross-complaint of said defendants as to this plaintiff and by way of cross-complaint thereto pursuant to [51] stipulation of all parties at pretrial hearing, plaintiff alleges:

1.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon.

2.

That Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp are individuals and insofar as all matters herein referred to and material hereto are concerned, were co-partners doing business under the assumed name of "Macri Company" and "Macri & Company", are all residents of King County in the Western District of the State of Washington, and said defendants are herein referred to collectively as "Macri Company".

3.

That heretofore and on or about the 18th of May, 1944, the defendants entered into a written contract with the United States of America acting by and through its Department of the Interior, Bureau of Reclamation, said contract being contract No. 12r-14996, specifications numbered 1068, for the performance of earthwork, pipe lines, and structural laterals and sub-laterals, Roza Division, Yakima Project, Washington, according to the terms

and specifications in said contract contained and provided, and particularly in accordance with said Specifications No. 1068, a copy of which contract is in the possession of the defendants.

4.

That thereafter and on or about the 21st day of April, 1944, the defendants Macri Company, writing their name "Macri & Company" entered into a sub-contract in writing with the plaintiff wherein and whereby said Macri Company subcontracted to said Concrete Construction Company, and said Concrete Construction Company agreed to do the following:

"To furnish all labor, and necessary equipment to do all the concrete work, formwork, structural timber work, cut, bend and install all reinforcing steel, all such work as shown on Plans and as specified in the Specifications No. 1068 Roza Division, Washington. Subcontractor shall clean all concrete forms, remove nails from same and pile same in neat piles. All forms and form lumber at completion of job shall remain the [52] property of the General Contractor. All work shall be done in strict accordance with Plans, Specifications, Government Inspection and to the satisfaction of the General Contractor.

"All materials except form wire, nails and curing materials will be furnished by the General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing materials.

“General Contractor will furnish only form lumber to the Subcontractor.”

a copy of said contract being in the possession of the defendants.

5.

That under and by virtue of said contracts and as a condition precedent to the performance of the work and the furnishing of materials by the plaintiff, the defendant was to do and perform all excavating work for the installation and placing of said concrete work and to furnish the form lumber therefor; that notwithstanding their contract obligation with reference to said excavation work and furnishing of said lumber, the defendants wholly failed, neglected and refused to perform said excavating work or to furnish said form lumber or to in any particular perform their part of said contract or tender performance thereof to enable the plaintiff to proceed with the performance on his part of said subcontract; that said plaintiff at all times stood ready, willing and able to perform his part of said subcontract upon the performance by the defendants of their part of said contract necessary and required to be performed by them as a condition precedent to the commencement of work by the plaintiff; that notwithstanding said fact and without ever tendering plaintiff performance on the part of said defendants of their part of said contract, the said defendants without just cause or excuse therefor and in violation of their said contract had the work called for in said contract performed by third parties.

6.

That prior to the execution of said subcontract hereinabove referred to the United States of America through the Department of Interior and the defendants Macri Company made and entered into a certain contract being Contract No. 124-14825 for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sub-laterals Roza Division Yakima Project, Washington, which said contract called [53] for the performance of work similar to and of the same general type and quality as called for in Contract No. 12r-14996 above referred to, and that pursuant to said Contract No. 12r-14825 the parties hereto entered into a subcontract on or about the 14th day of March, 1944, wherein and whereby the defendants Macri & Company subcontracted to the plaintiff work of the same general type and character as that covered by the subcontract entered into between the parties hereto under date of April 21, 1944, hereinabove referred to, copies of all of which contracts are within the possession of the defendants; that in entering into said subcontract of April 21, 1944, it was within the contemplation of the parties that the plaintiff and his equipment had already been located on the ground at the Roza Project for use in the performance of both said contracts by the plaintiff.

7.

That the reason of the defendants said breach of their said subcontract of April 21, 1944, and by reason of the said defendants failure to permit the

plaintiff to perform said subcontract, said plaintiff deprived of the profits which would have been realized by the plaintiff from the performance of said contract over and above all costs and expenses of performing said contract, said loss of profits being in the amount of not less than \$5,000.00.

8.

That said contract provides among other things as follows:

“Should the principal contractor fail to make payment in accordance with this agreement and the subcontractor bring suit to enforce payment and secure judgment thereon, the principal contractor will pay, in addition to such judgment, a reasonable amount to be fixed by the court as attorneys’ fees in connection with such suit.”

9.

That the ground upon which the jurisdiction of this court is invoked is that there is a diversity of citizenship between the plaintiff and the defendants, in that the plaintiff is a resident of the State of Oregon and the defendants are residents of the State of Washington and that the amount in controversy exceeds the sum of \$3,000.00. [54]

Wherefore having fully replied to the answer and cross-complaint of the defendants, Sam Macri, Don Macri, plaintiff prays that said defendants’ cross-complaint be dismissed with prejudice and that said

defendants take nothing thereby and that the plaintiff have and recover judgment as prayed for in his complaint, and in addition thereto that plaintiff have and recover judgment against the defendants Sam Macri, Don Macri and Joe Macri on plaintiff's cross-complaint herein in the sum of \$5000.00, together with plaintiff's costs and disbursements herein to be taxed and including plaintiff's reasonable attorney's fees to be taxed by the court in such sum as shall be deemed reasonable.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Plaintiff.

Service accepted and copy received of the foregoing Amended Reply and Cross-Complaint to Cross-Complaint of Defendants Macri this 18th day of January, 1947.

BROWN & HAWKINS,

Attorneys for A. J. Goerig &
Clyde Philp.

EUGENE D. IVY,

Attorney for Continental Casualty Company.

[Endorsed]: Filed Jan. 18, 1947. [55]

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Harry Olson and Fred C. Palmer appearing as attorneys for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Eugene D. Ivy appearing as attorney for defendant Continental Casualty Company.

It is stipulated that any party to this cause may offer in evidence any of the documents marked for identification in cause #267 and the documents marked for identification in this cause without objection as to genuineness of signatures and authenticity of such documents.

Plaintiff's Identification "1"—Subcontract on Specification #1062.

Plaintiff's Identification "2"—Subcontract on Specification #1068.

Plaintiff's Identification "3"—Specifications #1062.

Plaintiff's Identification "4"—Specifications #1068.

It is further stipulated that there are no written agreements between the defendants Macri and de-

defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees. [56]

It is further stipulated that at the time of entering the principal contracts, the defendants, Sam Macri, Joe Macri and Don Macri, were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

Plaintiff's motion to amend his answer to the cross-complaint of the defendants Macri by setting forth his claim for damages as set forth in his complaint in cause #1496 now pending in the District Court of the United States for the Eastern District of Washington and that he have ten days to file such amendment is granted.

It is further stipulated that the pending cause #1496 in the District Court of the United States for the Western District of Washington will be stayed pending the completion of the pleadings applied for by plaintiff's counsel and upon completion of said pleadings said cause #1496 will be dismissed without prejudice and without costs.

Mr. Holman for the defendants, Macri, moved to amend paragraph 5 of their cross-complaint

against the plaintiff to conform to the facts developed during the taking of the depositions in this cause.

No objections being made thereto, the motion is granted and the defendants, Macri, are given ten days to file said amendent.

It is further stipulated by all parties that the defense of arbitration is waived.

It is further stipulated by all parties that paragraphs "12", "2", "7" and "15" of the amended complaint are admitted.

It is further stipulated by all parties as to paragraph "13" of the amended complaint that the sum of \$32,614.66 has been paid to plaintiff by defendants.

Motion of plaintiff to amend paragraph 8 of his amended complaint next to the last line, by substituting for the words "Exhibit A" the words "Exhibit B" is granted.

Motion for plaintiff to amend paragraph "12" of his amended complaint, next to the last line, by substituting for the words "Exhibit B" the words "Exhibit A" is granted.

It is ordered and adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause, and that the trial of said cause be set for February 20, 1947, at 10:00 a.m.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Jan. 27, 1947. [58]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF
CONTINENTAL CASUALTY COMPANY

Second Cause of Action

First Affirmative Defense:

Further answering said Amended Complaint and by way of first affirmative defense thereto, this defendant, Continental Casualty Company, alleges that in the application made for its bond referred to in plaintiff's Complaint, the defendants Macri, doing business as Macri Company, for and on behalf of each of the defendants above named as co-partners and joint adventurers, specifically undertook and agreed in their written application to save harmless and indemnify the Continental Casualty Company against any and all loss, liability and cost on its bond, and that in the event that a judgment is entered in favor of plaintiff herein against this defendant, that this defendant should be subrogated to all rights of the plaintiff in said judgment against each of the defendants, other than this answering defendant.

/s/ EUGENE D. IVY,

Attorney for Defendant

Continental Casualty

Company. [54]

[Endorsed]: Filed Feb. 26, 1947.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the
use of M. C. Schaefer, an individual doing
business as Concrete Construction Company,
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, individuals
and copartners doing business as Macri Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a corporation,

Defendants.

MACRI'S PROPOSED JUDGMENT

(Refused May 1, 1947. Sam M. Driver, District
Judge.)

The above-entitled cause having come on duly
and regularly for trial before the Hon. Sam M.
Driver, Judge of the above-entitled court, on the
24th day of February, 1947, the use plaintiff, M. C.
Schaefer, an individual doing business as Concrete
Construction Company, appearing in person and by
his attorney, Harry L. Olson, of Olson & Palmer,
and the defendants Sam Macri, Don Macri and
Joe Macri appearing by Sam Macri, and each of
said defendants Macri appearing by and being
represented by their attorney, Tom W. Holman, of

Brethorst, Holman, Fowler & Dewar, and the defendants A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney, Kenneth Hawkins, of the firm of Brown & Hawkins, and the defendant Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the plaintiffs having waived in open court their demand for jury, upon motion having been made by each of the defendants for withdrawal of the case from the jury and the case having proceeded to trial before the court without a jury, and upon the use plaintiff's first witness, M. C. Schaefer been sworn and having disclosed by his testimony that no certificate of assumed trade name had been filed by him for the name Concrete Construction Company, and upon motion by all of the defendants, through their respective counsel of record herein, for dismissal of use plaintiff's complaint herein for failure so to comply with the laws of the State of [60] Washington, the court over objection of said counsel for defendants having permitted such use plaintiff then to file with the Clerk of Yakima County, Washington, a certificate of using such assumed trade name and to treat the amended complaint herein as showing such a filing, and also to treat the respective answers of said several defendants as amended to controvert such filing as untimely and without waiving objection against the use plaintiff further proceeding at trial, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and docu-

mentary, and having heard and considered the arguments of counsel and the written briefs filed in the matter, and the Court being fully advised in the premises and having heretofore made and entered findings of fact and conclusions of law, now therefore, it is

Ordered, Adjudged and Decreed that the use plaintiff be, and he is hereby, denied any judgment for any amount, and the amended complaint herein be, and it is hereby, dismissed in favor of the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, and against the other defendants to this action.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri be, and there are hereby, granted judgment against the use plaintiff for the sum of \$28,174.93, together with interest thereon at the rate of six per cent per annum from date hereof until paid, together with said defendants' costs and disbursements herein to be taxed and the sum of \$3,500 as attorneys' fees.

Done in Open Court this 1st day of May, 1947.

-----,
Judge.

[Endorsed]: Filed May 1, 1947.

[Title of District Court and Cause.]

MACRIS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

(Refused May 1, 1947, Sam M. Driver, District Judge.)

The above-entitled cause having come on duly and regularly for trial before the Hon. Sam M. Driver, Judge of the above-entitled Court, on the 24th day of February, 1947, the use plaintiff, M. C. Schaefer, an individual doing business as Concrete Construction Company, appearing in person and by his attorney, Harry L. Olson, of Olson & Palmer, and the defendants Sam Macri, Don Macri and Joe Macri appearing by Sam Macri, and each of said defendants Macri appearing by and being represented by their attorney, Tom W. Holman, of Brethorst, Holman, Fowler & Dewar, and the defendants A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney, Kenneth Hawkins, of the firm of Brown & Hawkins, and the defendant Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the plaintiffs having waived in open court their demand for jury, upon motion having been made by each of the defendants for withdrawal of the case from the jury and the case having proceeded to trial before the court without a jury, and upon the use plaintiff's first witness, M. C. Schaefer, having been sworn and having disclosed by his testimony that no certificate of assumed trade name had been filed by him for the name Con-

crete Construction Company, and upon motion by all of the defendants, through their respective counsel of record herein, for dismissal of [62] use plaintiff's complaint herein for failure so to comply with the laws of the State of Washington, the court over objection of said counsel for defendants having permitted such use plaintiff then to file with the Clerk of Yakima County, Washington, a certificate of using such assumed trade name and to treat the amended complaint herein as showing such a filing, and also to treat the respective answers of said several defendants as amended to controvert such filing as untimely and without waving objection against the use plaintiff further proceeding at trial, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and the written briefs filed in the matter, and the court being fully advised in the premises makes the following

Findings of Fact

I.

That this action is brought in the name of the United States of America as plaintiff for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, under and by virtue of the authority granted by an Act of Congress approved August 24, 1935, Chapter 642, Sections 1 and 2, 49 Statutes at large 793, 794.

II.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon, without having complied with the laws of the State of Washington as to filing any certificate of such assumed name.

III.

That Sam Macri, Don Macri and Joe Macri are individuals and co-partners doing business under the assumed name of Macri & Company and are residents of King County, State of Washington, and said defendants are hereinafter referred to as "Macri & Company." That the defendant A. J. Goerig and Clyde Philp are individuals and co-partners doing business as Goerig & Philp and residents of King [63] County, State of Washington.

IV.

That at all times herein mentioned the defendant Continental Casualty Company was and now is a corporation authorized to transact a surety business in the State of Washington.

V.

That on or about the 7th day of December, 1943, the United States of America, through the Department of Interior, and the defendants Macri & Company made and entered into a certain contract, being

Contract No. 12-4-14825 for earthwork, pipelines and structural laterals 59.3 to 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, wherein and whereby said defendant Macri & Company contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95, a copy of which said contract was admitted in evidence as plaintiff's Exhibit 1 and by reference thereto is made a part hereof as though fully set forth herein; that the contract above mentioned and the work to be performed thereunder is hereafter referred to as Contract 1062.

VI.

That on or about the 7th day of December, 1943, to secure the prompt payment of all persons supplying labor and materials employed or used in the prosecution of work provided for in said contract, said Macri & Company, as principal and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America, as obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon the surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect, a copy of said bond being admitted in evidence as plaintiff's Exhibit 1 and by reference made a part hereof as though fully set forth herein.

VII.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the Act [64] of Congress referred to hereinabove and said contract was performed and executed at or near Yakima, Yakima County, Washington, in the Eastern District of the State of Washington.

VIII.

That on or about the 11th day of December, 1943, the defendants Macri & Company and the defendants A. J. Goerig and Clyde Philp entered into a certain agreement termed a joint venture agreement, a copy of said agreement being admitted in evidence as defendant Macri's Exhibit 7, and by reference made a part hereof as though fully set forth herein.

That said Sam Macri, Don Macri and Joe Macri entered into a similar joint venture agreement with the defendants A. J. Goerig and Clyde Philp as to contract No. 1068, hereinafter referred to, a copy of which joint venture agreement was admitted in evidence as defendant Macri's Exhibit 8, and by reference made a part hereof as though fully set forth herein.

IX.

That on or about March 14, 1944, the said defendants Macri, acting as aforesaid, entered into a written subcontract with the use plaintiff, as shown by copy thereof admitted in evidence herein as use

plaintiff's Exhibit 5 and by reference made part hereof as though fully set forth herein; said subcontract providing for performance of a portion of aforesaid public work under Contract 1062. That on or about April 21, 1944, said defendants Macri, acting as aforesaid, entered into a written subcontract with the use plaintiff, a copy of which is admitted in evidence as Plaintiff's Exhibit 6, and by reference made a part hereof as though fully set forth herein, under and by the terms of which contract the said use plaintiff contracted to perform a portion of the public work provided under Specification 1068.

X.

That pursuant to said subcontract calling for performance of work under said Specification 1062 the use plaintiff completed the work called for by said subcontract and was paid for the performance of said work, with the exception of the [65] sum of \$1,449.88.

XI.

That notwithstanding the undertakings, terms and conditions of the aforesaid subcontract calling for the performance of specified work under Specifications 1068 and despite due demand from the defendants Macri, acting as aforesaid, to the use plaintiff, as disclosed by exhibits on file herein and by reference incorporated as part hereof, said use plaintiff failed and refused to commence or perform the work called for by said subcontract. That as a result of said failure and refusal so to perform, the defendants

Macri were compelled to pay and did pay for the performance of the work called for by said subcontract under said Specifications 1068 the sum of \$72,759.98, as evidenced by defendants Macri's Exhibit No. 91 on file herein and by reference incorporated as part hereof. That, after deducting from said sum of \$72,759.98 the amount called for payment for performance of the work under said subcontract in the amount of \$43,135.17, there remained as additional costs to the defendants Macri, by reason of the failure of the use plaintiff, the sum of \$29,624.81, against which there were no payments, credits or offsets save for the aforesaid \$1,449.88 balance earned under the other subcontract for performance under Specifications 1062, and that by the deduction of said amount of \$1,449.88 there remained and has at all times since remained due to the defendants Macri from the use plaintiff the sum of \$28,174.93.

XII.

That the use plaintiff at all times failed in any and every manner to give any notice as called for by the terms of the aforesaid subcontract in evidence as use plaintiff's Exhibit 5, covering work under Specifications 1062.

XIII.

That the use plaintiff at all times failed in any and every manner to give any notice as called for by the terms of the aforesaid subcontract in evidence as use plaintiff's Exhibit 2, covering work under Specifications 1068. [66]

XIV.

That the Treasury Department, acting through the Internal Revenue Service, served upon the defendants a notice of levy claiming a tax lien for \$10,-224.95 against the amount of any recovery in these proceedings, a copy of which notice of tax levy was admitted in evidence as defendant Macri's Exhibit 67.

XV.

That the sum of \$3,500 is a reasonable sum to be allowed the defendants Macri, acting as aforesaid, as an attorneys' fee against the use plaintiff, M. C. Schaefer, doing business as Concrete Construction Company, herein.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

That judgment should be entered herein as follows:

1. Denying the use plaintiff any judgment for any amount and dismissing the amended complaint herein in favor of the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, and against the other defendants to this action.

2. That the defendants Sam Macri, Joe Macri and Don Macri should have judgment against the use plaintiff for the sum of \$28,174.93, together with interest thereon at the rate of six per cent per an-

num from date of judgment herein until paid, together with said defendants' costs and disbursements herein to be taxed, and the sum of \$3,500 as attorneys' fees.

Done in Open Court this 1st day of May, 1947.

.....

Judge.

[Endorsed]: Filed May 1, 1947. [67]

[Title of District Court and Cause.]

MACRIS' PROPOSED ALTERNATE PROPOSAL IF THE FOREGOING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT BE NOT ENTERED

(Refused May 1, 1947. Sam M. Driver, District Judge.)

In the event the Court declines to enter the foregoing form and substance of findings of fact, conclusions of law and judgment, as submitted by the defendants Sam Macri, Joe Macri and Don Macri, doing business as Macri & Company, said defendants then, without waiver of any of their rights to except to the Court's failure so to do, submit with respect to any amount of judgment which may be entered against said defendants in favor of the use plaintiff the following proposed findings of fact, conclusions of law and judgment provisions, namely:

Findings of Fact

That on or about July 15, 1944, the defendants Macri, individually and as copartners, as aforesaid, and the defendants A. J. Goerig and Clyde Philp, individually and as copartners, entered into a written agreement purporting to terminate the aforesaid joint venture agreements in accordance with the terms and provisions of said termination agreement, copy of which said purported termination was admitted in evidence as Goerig & Philp's Exhibit 9 and by reference is made a part hereof as though fully set forth herein; and that the amount of any judgment which may be entered herein against the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, is a [68] loss determined in this action against said defendants and pertaining to the respective public works contracts designated as Specifications 1062 and 1068.

Conclusions of Law

That the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, should have judgment against the defendants A. J. Goerig and Clyde Philp, individually and as copartners doing business as Goerig & Philp, to the extent of 52 $\frac{1}{3}$ % of whatever amount of judgment may be entered against the said defendants Macri, dealing as aforesaid, together with interest thereon at six per cent

per annum from the date of the judgment, until paid, together with $52\frac{1}{3}\%$ of all costs and disbursements which may be asserted against the defendants Macri.

That the cross-complaint of the defendants Philp & Goerig against the defendants Macri, dealing as aforesaid, should be dismissed without prejudice and without costs.

Judgment

That the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, be, and they are hereby, granted judgment against the defendants A. J. Goerig and Clyde Philp, individually and as copartners doing business as Goerig & Philp, in the amount of \$....., together with interest thereon at six per cent per annum from the date of the judgment, until paid, together with $52\frac{1}{3}\%$ of all costs and disbursements herein taxed against the defendants Macri.

It Is Further Ordered, Adjudged and Decreed that the cross-complaint of the defendants A. J. Goerig and Clyde Philp against the defendants Macri, dealing as aforesaid, be, and the same is hereby, dismissed without prejudice and without costs.

[Endorsed]: Filed May 1, 1947. [69]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on duly and regularly for trial before the Hon. Sam M. Driver, Judge of the above-entitled court on the 24th day of February, 1947, the use plaintiff, M. C. Schaefer, an individual doing business as Concrete Construction Company, appearing in person and by his attorney, Harry L. Olson, of Olson & Palmer, and the defendants, Sam Macri, Don Macri and Joe Macri, appearing by Sam Macri and each of said defendants Macri appearing by and being represented by their attorney Tom W. Holman, of Brethorst, Holman, Fowler & Dewar, and the defendants, A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney, Kenneth Hawkins of the firm of Brown & Hawkins, and the Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the plaintiffs having waived in open court their demand for jury upon motion having been made by each of the defendants for withdrawal of the case from the jury, and the case having proceeded to trial before the court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and the written briefs filed in the matter, and the court being fully advised in the [70] premises makes the following

Findings of Fact

1.

That this action is brought in the name of the United States of America as plaintiff for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, under and by virtue of the authority granted by an Act of Congress approved August 24, 1935, Chapter 642, Sections 1 and 2, 49 Statutes at large 793, 794.

2.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon and certificate of assumed name was filed in Yakima County as shown by Plaintiffs' Exhibit No. 59.

3.

That Sam Macri, Don Macri and Joe Macri are individuals and co-partners doing business under the assumed name of Macri Company and Macri & Company and are residents of King County, State of Washington, and said defendants are hereinafter referred to as "Macri Company." That the defendants A. J. Goerig and Clyde Philp are individuals and were residents of King County, State of Washington, at the time of commencement of the above-entitled action.

4.

That at all times herein mentioned the defendant, Continental Casualty Company was and now is a corporation authorized to transact a surety business in the State of Washington.

5.

That on or about the 7th day of December, 1943, the United States of America, through the Department of Interior, and the defendants Macri Company made and entered into a certain contract, being Contract No. 12-r-14825 for earthwork, pipelines and structural laterals 59.3 to 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, wherein and whereby said defendant Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95, a copy of which said contract was admitted [71] in evidence as plaintiff's Exhibit 1 and by reference thereto is made a part hereof as though fully set forth herein; that the contract above mentioned and the work to be performed thereunder is hereinafter referred to as Contract 1062.

6.

That on or about the 7th day of December, 1943, to secure the prompt payment of all persons supplying labor and materials employed or used in the prosecution of work provided for in said contract, said Macri Company as Principal and the Continental Casualty Company, a corporation, as

surety, made, executed and delivered to the United States of America, as Obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon the surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect, a copy of said bond being admitted in evidence as plaintiff's Exhibit 1 and by reference made a part hereof as though fully set forth herein.

7.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of Act of Congress referred to hereinabove and said contract was performed and executed at or near Yakima, Yakima County, Washington, in the Eastern District of the State of Washington.

8.

That on or about the 11th day of December, 1943, the defendants Macri & Company and the defendants A. J. Goerig and Clyde Philp entered into a certain agreement termed a joint venture agreement, a copy of said agreement being admitted in evidence as defendant Macri's Exhibit 7, and by reference made a part hereof as though fully set forth herein.

That said Sam Macri, Don Macri and Joe Macri entered into a similar joint venture agreement with

the defendants A. J. Goerig and Clyde Philp as to contract No. 1068, hereinafter referred to, a copy of which joint venture agreement was admitted in evidence as defendant [72] Macri's Exhibit 8 and by reference made a part hereof as though fully set forth herein.

9.

That on or about the 15th day of July, 1944, the defendants, Macri & Company, and the defendants, A. J. Goerig and Clyde Philp, entered into an agreement terminating said joint venture agreement in accordance with the terms and provisions of said termination agreement, a copy of which termination agreement was admitted in evidence as defendant Goerig and Philp's Exhibit 9 and by reference made a part hereof, as though fully set forth herein. That the defendants, Clyde Philp and A. J. Goerig, were not known to the plaintiff until the commencement of this action or shortly thereafter. That Clyde Philp and A. J. Goerig were dormant or silent co-partners or co-adventurers of Macri and Company. That the application for the bond hereinabove referred to and the execution and issuance of the bond by Continental Casualty Company took place four days prior to the execution of said joint venture agreements. That said joint venture agreements executed by Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp specifically ratified and adopted for and on behalf of said joint venture the bond and application for bond executed four days previously. The termination agreement terminating

said joint venture was executed July 15, 1944. That the quasi contract or implied contract by which Macri and Company are liable to the plaintiff for the value of materials and services furnished was consummated after the date of the termination agreement. The defendants, Clyde Philp and A. J. Goerig, are not liable to the plaintiff. The defendants, Clyde Philp and A. J. Goerig, are liable to the defendant, Continental Casualty Company, on its cross-complaint in the same amount and to the same extent that the defendant, Continental Casualty Company, is liable to the plaintiff.

10.

That heretofore and on or about the 14th day of March, 1944, the defendants Macri Company, writing their name Macri & Company, entered into a writing with the use plaintiff wherein and whereby said Macri Company sub-contracted to the said use plaintiff, doing business as Concrete Construction Company the following work "the furnishing of all labor and necessary equipment to do all of the concrete work, form [73] work, cut, bend and install all reinforcing steel, all such work as shown on the plans and as specified in the specifications No. 1062, Contract No. 12-r-14825, Roza Division, Yakima Project, Washington." All of the excavating and all of the materials necessary for the performance of said subcontract by the Concrete Construction Company were to be furnished by the defendants Macri Company with the exception of form wire, nails and curing material, said excavating and said materials

to be furnished, done and supplied in accordance with the plans and specifications above referred to and in proper time for the performance of said subcontract by the plaintiff, Concrete Construction Company, a copy of said subcontract being admitted in evidence as plaintiff's Exhibit 5 and by reference made a part hereof as though fully set forth herein.

11.

That pursuant to said subcontract above referred to, being plaintiff's exhibit 5, the said subcontractor Concrete Construction Company entered into the diligent performance of said subcontract and commenced with the furnishing of labor and materials and the performance of services called for in said subcontract.

12.

That it was the obligation of the defendants Macri Company to do the excavation in such a way as to afford reasonable clearance and a reasonable opportunity for the subcontractor to properly and efficiently carry out its part of the work, and that the clearance reasonably required where a form had to be placed between the concrete and the bank required an excavation of 1 foot out at the base of the excavation from the outside wall of the concrete structure to be installed and a slope of one to one on the bank; that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical

banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient width in the excavation to enable the subcontractor to efficiently and properly construct his forms and that he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of [74] the work.

That the defendants Macri and Company failed to do the fine grading in accordance with the lay-out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work.

That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work.

13.

That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality was not proper and suitable for the work intended; that much of the time there was missing

some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind.

14.

That the defendants Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was wilful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff.

15.

That immediately after the commencement of the work by the [75] use plaintiff Concrete Construction Company the said use plaintiff and his representatives complained to the defendants Macri Company and to Mr. Sam Macri and to his agents on the job as to the failure of the defendants Macri Company to comply with the terms of its subcontract, and that said use plaintiff stated he would pull off the job if conditions were not improved and that the defendants Macri Company on several occasions

promised that they would do better and that they would see that their work was done in accordance with the requirements of the subcontract and in a proper manner and advised the use plaintiff that if he would go on and complete the contract that the use plaintiff wouldn't lose anything on the contract and that the defendants Macri Company would make it right and would pay the use plaintiff for what he might lose under the adverse conditions created by the defendants Macri and Company's failure to do their work properly; that by said promises the defendant Macri Company induced the use plaintiff to proceed with the work and that the use plaintiff did proceed with the work by reason of said representations, and that there was an implied agreement or a quasi-contract that the use plaintiff, M. C. Schaefer, was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon said use plaintiff by Macri Company's breach and failure to perform his part of the subcontract in the particulars herein set forth.

16.

That pursuant to said subcontract as to job 1062 and pursuant to the oral conversations, representations and inducements herein referred to, the use plaintiff Concrete Construction Company between the 14th day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for the defendants Macri Company at their special instance and request of the reason-

able cost and value of \$89,498.71; that said labor and materials and services performed are as shown on plaintiff's Exhibit 63 with the exception of the items designated engineering expense of \$201.25, legal expense \$533.57, interest \$3,745.57, which three items the court finds are [76] not proper items.

That the defendants Macri Company have paid on account of said indebtedness the sum of \$32,614.66, leaving a balance now due, owing and unpaid in the amount of \$56,764.97, which amount together with interest at 6% from the date of entry of judgment is now due and owing and unpaid.

17.

That in pretrial proceedings had in this case all of the defendants waived any defense or requirement of arbitration; that more than 90 days have elapsed since the last of said work, labor and materials and services were furnished by said Concrete Construction Company, the use plaintiff, as hereinabove set forth, and that less than one year has elapsed since the complete performance and final settlement on said contract No. 12-r-14825 was made; that final settlement and acceptance under said contract was made on March 31, 1945.

18.

That the ground upon which the jurisdiction of this court is invoked is that the action arises under the Act of Congress referred to hereinabove and also 40 U.C.S.A. 270, which expressly directs the

bringing of this action in this court, to-wit, the United States District, Eastern District of Washington, Southern Division, being the district in which said contract was to be and was performed and executed.

19.

That in connection with the bond hereinabove referred to and being admitted into evidence as plaintiff's Exhibit 1, the defendants Macri Company executed an application for said bond on a form of the Continental Casualty Company, said application being admitted into evidence as defendant Casualty Company's Exhibit 10.

20.

That the Treasury Department, acting through the Internal Revenue Service, served upon the defendants a notice of levy claiming a tax lien against the amount of any recovery in these proceedings, a copy of which notice of tax levy was admitted in evidence as defendant [77] Macri's Exhibit 67.

21.

That heretofore and on or about the 18th day of May, 1944, the defendants Macri Company entered into a written contract with the United States of America, acting by and through its Department of Interior, Bureau of Reclamation, said contract being No. 12-r-14996, specifications No. 1068, for the performance of earthwork, pipelines and structural laterals, Roza Division, Yakima Project, Washing-

ton, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specifications No. 1068, a copy of which contract was received in evidence marked plaintiff's exhibit 2 and by reference made a part hereof, as though fully set forth herein. The contract in this paragraph mentioned and the work to be performed thereunder is hereinafter referred to as contract No. 1068. That thereafter and on or about the 21st day of April, 1944, the defendants, Macri Company, entered into a subcontract in writing with the plaintiff wherein and whereby said Macri Company subcontracted to said Concrete Construction Company and said Concrete Construction Company agreed to do the following:

"To furnish all labor, and necessary equipment to do all the concrete work, formwork, structural timber work, cut, bend and install all reinforcing steel, all such work as shown on Plans and as specified in the Specifications No. 1068 Roza Division, Washington. Subcontractor shall clean all concrete forms, remove nails from same and pile same in neat piles. All forms and form lumber at completion of job shall remain the property of the General Contractor. All work shall be done in strict accordance with Plans, Specifications, Government Inspection and to the satisfaction of the General Contractor.

"All materials except form wire, nails and securing materials will be furnished by the General Contractor or/and Owner. Sub-contractor

will furnish the above wire, nails and curing materials.

“General Contractor will furnish only form lumber to the sub-contractor.”

a copy of said subcontract being received in evidence as plaintiff's Exhibit 6 and by reference made a part hereof as though fully set forth herein.

22.

That under and by virtue of said contracts and as a condition [78] precedent to the performance of the work and the furnishing of materials by the plaintiff, the defendant was to do and perform all excavating work for the installation and placing of said concrete work and to furnish the form lumber therefor; that notwithstanding their said contract obligation with reference to said excavation work and furnishing of said form lumber, the said defendants wholly failed, neglected and refused to perform said excavating work or to furnish said form lumber or to in any particular perform their part of said contract or tender performance thereof to enable the plaintiff to proceed with the performance on his part of said subcontract; that said plaintiff at all times stood ready, willing and able to perform his part of said subcontract upon the performance by the defendants of their part of said contract necessary and required to be performed by them as a condition precedent to the commencement of work by the plaintiff; that notwithstanding said fact and without ever tendering plaintiff performance on the part of said defendants of their part of said contract, the said defendants without just

cause or excuse therefor and in violation of their said contract had the work called for in said contract performed by third parties.

23.

That on November 30, 1944, when the defendants Macri Company addressed a letter to Concrete Construction Company dated November 30, 1944, directing the Concrete Construction Company to proceed with its contract under contract No. 1068, a copy of said letter being received in evidence as plaintiff's Exhibit 30 and by reference made a part hereof as though fully set forth herein, there had never been any excavations fine graded and ready to receive forms, and that on January 3, 1945, when the defendant Macri Company addressed a letter to the Concrete Construction Company holding the said Concrete Construction Company in default, a copy of which letter was admitted in evidence as Plaintiff's Exhibit 31 and by reference made a part hereof as though fully set forth herein, there were no excavations fine graded and ready to receive forms and that the defendant Macri breached said contract 1068, [79] but that the loss of prospective profits as to said contract were too speculative and uncertain and vague to warrant a recovery on the part of use plaintiff Schaefer for more than nominal damages.

24.

That in conversations between Mr. Sam Macri and Mr. M. C. Schaefer hereinabove referred to and on many other occasions Mr. Schaefer and his em-

ployees and representatives repeatedly and frequently complained to Mr. Sam Macri and to his agents on the job as to the failure of the defendants Macri to perform said contract No. 1062 according to its terms, including the particulars hereinabove referred to, and that at all times throughout the performance of the work said defendants Macri had notice of these complaints and had notice and knowledge of the defendants Macri's failure and his agents and employees failure to perform said contract No. 1062, according to its terms, that said defendants Macri accepted and acted upon said oral complaints and notices as to said breaches, that the defendants Macri knew of the conditions and that they waived any and all requirements contained in said subcontract No. 1062 as to the giving of written notices.

25.

That the sum of \$1,750.00 is a reasonable sum to be allowed the defendant Continental Casualty Company against the other defendants for its reasonable attorney's fees herein.

From the foregoing Findings of Fact the court makes the following

Conclusions of Law

That judgment should be entered herein as follows:

1. The use plaintiff should have and recover judgment against the defendants, Sam Macri, Don

Macri and Joe Macri, doing business as Macri Company, and the Continental Casualty Company, and each of them, in the sum of \$56,764.97 as to Job 1062, which said amount should bear interest at the rate of 6% per annum from the date of entry of judgment until paid, and that said judgment shall also be against said defendants [80] for use plaintiff's costs and disbursements herein expended and incurred and to be taxed herein.

2. That the use plaintiff, M. C. Schaefer, is not entitled to judgment against the defendant, A. J. Goerig and Clyde Philp.

3. That the defendant Continental Casualty Company, an Indiana corporation, is entitled to recover judgment against the defendants, Sam Macri, Don Macri and Joe Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from and after the filing of judgment, together with reasonable attorney's fees in the amount of \$1,750.00, together with defendant Continental Casualty Company's costs and disbursements taxed in the amount of \$., together with interest at 6% from date of entry of judgment.

4. That the use plaintiff is entitled to judgment against the defendants Sam Macri, Don Macri and Joe Macri for nominal damages in the sum of \$1.00 as to Job No. 1068, which amount shall bear interest at 6% per annum from the date of entry of judgment herein.

5. That the cross-complaint of the defendants Sam Macri, Don Macri and Joe Macri against the use plaintiff should be dismissed with prejudice and without costs and that said defendants recover nothing thereby.

6. That none of the defendants are entitled to recover anything from the use plaintiff.

7. That the judgment of the use plaintiff to be entered herein shall be subject to the lien of the certificate of levy of the United States of America, a copy of which was received in evidence as Macri's Exhibit 67.

8. That the use plaintiff is entitled to maintain this action notwithstanding the non-filing in Yakima County, Washington, of a certificate of assumed name prior to commencement of the trial.

9. The cross-complaint of the defendants, Sam Macri, Don Macri and Joe Macri, against the defendants Clyde Philp and A. J. Goerig should be dismissed without costs.

10. The cross-complaint of A. J. Goerig and Clyde Philp, defendants, against Sam Macri, Don Macri and Joe Macri, defendants, should be dismissed without costs.

Done in Open Court this first day of May, 1947.

/s/ SAM M. DRIVER,

Judge.

Presented by:

/s/ HARRY L. OLSON,

Of Attorneys for Plaintiff.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the
use of M. C. Schaefer, an individual doing
business as Concrete Construction Company,
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, individuals
and co-partners doing business as Macri Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a corporation,
Defendants.

JUDGMENT

The above entitled cause having come on duly
and regularly for trial before the Hon. Sam M.
Driver, Judge of the above entitled Court, on the
24th day of February, 1947, the use Plaintiff, M. C.
Schaefer, an individual doing business as Concrete
Construction Company, appearing in person and by
his attorney Harry L. Olson, of Olson & Palmer,
and the Defendants Sam Macri, Don Macri and
Joe Macri appearing by Sam Macri, and each of
said Defendants Macri appearing by and being
represented by their attorney, Tom W. Holman of
Brethorst, Holman, Fowler and Dewar, and the
Defendants A. J. Goerig and Clyde Philp appear-
ing by A. J. Goerig and their attorney Kenneth

Hawkins of the firm of Brown & Hawkins, and the Defendant, Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the Plaintiffs having waived in open Court their demand for jury, upon motion having been made by each of the Defendants for withdrawal of the case from the jury and the case having proceeded to trial before the Court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary and having heard and considered the arguments of counsel and written briefs filed in the matter, and the [82] Court being fully advised in the premises and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer have and recover judgment against the Defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners doing business as Macri Company, and the Continental Casualty Company, a corporation, and each of them, for the sum of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof until paid, and for the use Plaintiff's costs and disbursements herein expended and incurred in the amount of \$921.70.

It Is Further Ordered, Adjudged and Decreed That Plaintiff's complaint as to the Defendants, A. J. Goerig and Clyde Philp be dismissed with prejudice and without costs.

It Is Further Ordered, Adjudged and Decreed That the Defendant, Continental Casualty Company, an Indiana corporation, have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof, and for the further sum of \$1,750.00 for said Continental Casualty Company's attorney's fees herein, and for its costs and disbursements herein taxed in the amount of \$ none, together with interest at 6% from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, co-partners and individuals doing business as Macri Company, for the sum of \$1.00 damages as to Specifications 1068, which amount shall bear interest at 6% per annum from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of the Defendants, Sam Macri, Joe Macri and Don Macri against the use Plaintiff be and the same is hereby dismissed with prejudice and without costs and that said Defendants recover nothing thereby.

It Is Further Ordered, Adjudged and Decreed that the judgment of the use Plaintiff entered herein is subject to the lien of the United States of America under its certificate of levy, copy of

which was received in evidence as Macris' Exhibit 67. [83]

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of Sam Macri, Joe Macri and Don Macri against the Defendants A. J. Goerig and Clyde Philp be and the same is hereby dismissed without costs.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of A. J. Goerig and Clyde Philp against the Defendants, Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Done in Open Court this first day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. [84]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now, Continental Casualty Company, a corporation, one of the defendants in the above-entitled cause, and moves the Court for an order vacating and setting aside the judgment in the above-entitled action and awarding a new trial for the following reasons:

1.

The judgment was not sustained by substantial evidence.

2.

The judgment was contrary to law.

3.

The Court erred in finding that any sum in excess of \$2656.46 was owing by this defendant, Continental Casualty Company, a corporation, to the plaintiff.

4.

The Court erred in finding as a fact that the law of the State of Washington applied and that the Federal rule as to damages did not apply.

5.

That the Court erred in entering judgment against the defendant, Continental Casualty Company, for any sum in excess of \$2656.46. [85]

6.

That said motion is further based upon all the files and records in said cause.

Dated this 8th day of May, 1947.

EUGENE D. IVY,
Attorney for Defendant,
Continental Casualty
Company.

[Endorsed]: Filed May 9, 1947. [86]

[Title of District Court and Cause.]

ORDER DENYING MOTIONS FOR
NEW TRIAL

The above entitled cause having come on regularly for argument on this 20th day of May, 1947, upon the motion of A. J. Goerig and Clyde Philp and upon the motion of Continental Casualty Company, a corporation, for a new trial in the above entitled matter, the Continental Casualty Company appearing by and through its attorney Eugene D. Ivy, and the defendants, A. J. Goerig and Clyde Philp appearing by and through their attorneys, Brown & Hawkins, and the use plaintiff appearing by and through his attorney, Harry L. Olson, and the Court having duly considered said motions and argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the motion of A. J. Goerig and Clyde Philp for a new trial and the motion of the Continental Casualty Company for a new trial, and each of them, be and the same are hereby denied.

Done in Open Court this 20th day of May, 1947.

/s/ SAM M. DRIVER,

Judge.

Presented by:

/s/ HARRY L. OLSON,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1947. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Continental Casualty Company, a corporation, one of the defendants above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on the 1st day of May, 1947.

/s/ EUGENE D. IVY,
Attorney for Appellant,
Continental Casualty
Company.

Copy mailed to Holman, Olsen & Hawkins
5/21/47.

A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed May 20, 1947. [88]

[Title of District Court and Cause.]

ORDER DETERMINING AMOUNT OF BOND

This matter coming on duly and regularly before the undersigned Judge of the above-entitled Court, upon the motion of the defendant Continental Casualty Company, pursuant to Rule 73, Subdivision "E" of Rules of Civil Procedure, and the Court being fully advised;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendant Continental Casualty Company be, and the same is, hereby authorized to file a supersedeas bond of appeal herein within five days from the date hereof, which supersedeas appeal bond shall be in the sum of Sixty-five thousand dollars.

Done in Open Court this 20th day of May, 1947.

/s/ SAM M. DRIVER,
Judge.

Presented by:

EUGENE D. IVY,
Attorney for Defendant,
Continental Casualty
Company.

[Endorsed]: Filed May 20, 1947.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND
ON APPEAL

Bond #910100. National Casualty Company
Know All Men by These Presents: That we, Continental Casualty Company, a corporation, as principal and National Casualty Company, a Michigan Corporation, as surety, acknowledge ourselves to be jointly indebted to M. C. Schaefer, an individual doing business as Concrete Construction Company,

as use plaintiff and appellee in the above cause in the sum of Sixty-five Thousand and no/100 (\$65,000.00) Dollars, conditioned that whereas on the 1st day of May, 1947, in the District Court of the United States for the Eastern District of Washington, Southern Division, in a suit pending in that court wherein M. C. Schaefer, an individual doing business as Concrete Construction Company, was use plaintiff and Continental Casualty Company was one of the defendants, numbered on the Civil Docket as 246, a judgment was rendered against the said Continental Casualty Company; and the said Continental Casualty Company having filed in the office of the Clerk of said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco in the State of California.

Now the condition of the above obligation is such that if the said Continental Casualty Company shall prosecute its appeal to effect and satisfy the said judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge [90] and award, then the above obligation is void, else to remain in full force and effect.

Sealed with our seals and dated this 22nd day of May, 1947.

[Seal]

CONTINENTAL CASUALTY
COMPANY,

By /s/ WARNER M. BRUCE,
Superintendent of Claims,
Principal.

[Seal]

NATIONAL CASUALTY
COMPANY,

By /s/ L. G. GREWE,
Attorney-in-Fact,
Surety.

Approved this 26th day of May, 1947.

SAM M. DRIVER,
Judge.

[Endorsed]: Filed May 26, 1947. [91]

[Title of District Court and Cause.]

APPELLEES' DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Comes now the Appellee, by his attorneys, Harry L. Olson and Fred C. Palmer, and designates the following proceedings and evidence, which he wishes prepared for transmission to the Circuit Court of Appeals, in addition to the pleadings, proceedings and evidence, heretofore designated by the Appellant. Said Appellee's designation is in connection with the appeal, heretofore filed in the above cause:

1. Exhibits as follows:

Plaintiff's Exhibits 12, 22, 23, 24, 25, 26,
29, 44, 49, 51, 60.

2. Reporter's transcript of evidence of the testimony of L. R. Hendershot, W. E. Schaefer and Fred Waltie.

Dated this 14th day of June, 1947.

Respectfully submitted,

HARRY OLSON,

FRED C. PALMER,

Attorneys for Appellee,

M. C. Schaefer.

Service accepted and copy received of the foregoing Appellee's Designation of Contents of Record on Appeal this 14th day of June, 1947.

EUGENE D. IVY,

Attorney for Appellant,

Continental Casualty
Company.

[Endorsed]: Filed June 14, 1947. [92]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMISSION OF
EXHIBITS TO CIRCUIT COURT OF AP-
PEALS

It Is Hereby Stipulated by and between Harry L. Olson and Fred C. Palmer, attorneys for the Plaintiff, and Eugene D. Ivy, attorney for Defendant Continental Casualty Company, a corporation, that the following exhibits, to-wit, Plaintiff's Exhibits:

1, 3, 5, 12, 22, 23, 24, 25, 26, 29, 44, 49, 51,
60, 61 and 63, Defendant Macris' Exhibit 7,
Continental Casualty Company's Exhibit 10,

the same being printed matter and physical exhibits, not capable of adequate reproduction, be submitted to the Circuit Court of Appeals as a part of the record of appeal of the Continental Casualty Company.

Dated this 14th day of June, 1947.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for use Plaintiff,

M. C. Schaefer.

EUGENE D. IVY,

Attorney for Defendant,

Continental Casualty

Company.

[Endorsed]: Filed June 14, 1947. [93]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The United States District Court was in error in granting judgment to the plaintiff and refusing to grant a new trial for the defendant Continental Casualty Company, for the reason that there was no evidence presented segregating the items of expense within and without the contract, and the law will not allow recovery from the surety on a payment bond for items properly classified as damages.

2. The United States District Court erred in holding as a matter of law that under the Miller Act compensation on quantum meruit for labor and material furnished because the prime contractor breached his contract by delaying the job or failing to do the things required under the subcontract can be recovered from the surety on the payment bond.

3. The United States District Court erred in not holding that any amounts recoverable from the defendant Macris in excess of \$2656.46 was without the scope of the contract and therefore not recoverable against the surety, Continental Casualty Company.

EUGENE D. IVY,

Attorney for Appellant.

Service accepted and copy received of foregoing Statement of Points on Appeal this 6th day of June, 1947.

FRED C. PALMER,
HARRY L. OLSON,

Of Attorneys for Use

Plaintiff, M. C. Schaefer.

[Endorsed]: Filed June 6, 1947. [94]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Comes Now, the appellant by its attorney, Eugene D. Ivy, and designates the following pleadings, proceedings and evidence which it wishes prepared for transmission to the Circuit Court of Appeals in connection with the appeal heretofore filed in the above cause:

1. Plaintiff's Amended Complaint.
2. Defendant Continental Casualty Company's Answer.
3. Order on Pre-Trial.
4. Amendment of Continental Casualty Company to First Affirmative Defense of Second Cause of Action of Answer.
5. Reporter's transcript of evidence of the testimony of M. C. Schaefer, Al Hunter and Larry Bufton, and reporter's transcript of Court's Decision.
6. Exhibits as follows:
Plaintiff's Exhibits 1, 3, 5, 61 and 63;
Defendant Macris' Exhibit 7;
Continental Casualty Company's Exhibit 10.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Motion for New Trial.

10. Order Denying Motion for New Trial.
11. Notice of Appeal.
12. Order Authorizing Filing of Bond.
13. Bond.
14. Stipulation for Transmission of Exhibits to Circuit Court.
15. Order Directing Clerk to Transmit Exhibits to Circuit Court.
16. Statement of Points on Appeal.
17. Appellant's Designation of Record on Appeal. [95]

Dated this 5th day of June, 1947.

Respectfully submitted,

EUGENE D. IVY,

Attorney for Appellant,
Continental Casualty
Company.

Service accepted and copy received of the foregoing Appellant's Designation of Contents of Record on Appeal this 6th day of June, 1947.

FRED C. PALMER,

HARRY L. OLSON,

Of Attorneys for Use
Plaintiff, M. C. Schaefer.

[Endorsed]: Filed June 6, 1947. [96]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR PREPARATION AND DOCKETING OF RECORD ON APPEAL

It appearing to the Court that a notice of appeal was filed in the above entitled cause on May 20, 1947;

And it further appearing to the Court that since said date the official court reporter of this Court has been engaged in reporting trials for a large portion of that period, and will be unable to transcribe the testimony as requested by appellants within the period prescribed by rules;

Now, Therefore, the Court on its own motion does hereby extend the time for the preparation and docketing of the record on appeal in said cause for a period of ninety (90) days from the date of the filing of the notice of appeal as herein above set forth.

Dated this 18th day of June, 1947.

SAM M. DRIVER,

United States District Judge.

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO TRANSMIT EXHIBITS TO CIRCUIT COURT OF APPEALS

This matter, coming on regularly before the undersigned Judge of the above entitled Court, on

the stipulation of counsel for the use Plaintiff, M. C. Schaefer, and the Continental Casualty Company, Defendant, and the Court being advised in the premises;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: That the Clerk of the Court be and he is hereby directed and authorized to transmit to the Circuit Court of Appeals, Plaintiff's Exhibits 1, 3, 5, 12, 22, 23, 24, 25, 26, 29, 44, 49, 51, 60, 61, and 63, Defendant Macris' Exhibit 7, Continental Casualty Company's Exhibit 10, such exhibits being evidence not capable of adequate reproduction.

It Is Further Ordered, Adjudged and Decreed that the Clerk of the Court take such precautions as are necessary for the safe keeping, transportation and return of said original exhibits.

Done in Open Court this 18th day of June, 1947.

SAM M. DRIVER,

Judge. [98]

Presented by:

EUGENE D. IVY,

Attorney for Defendant
Continental Casualty
Company.

Approved as to form:

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Use Plaintiff,
M. C. Schaefer.

[Endorsed]: Filed June 18, 1947. [99]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from an order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

/s/ KENNETH C. HAWKINS,

/s/ NAT. N. BROWN,

Attorneys for Appellants,

A. J. Goerig and

Clyde Philp.

[Endorsed]: Filed July 29, 1947. [100]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

No. 42447. Manufacturers Casualty Insurance Co.

Know All Men By These Presents:

That we, A. J. Goerig & Clyde Philp, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of

Washington, as Surety, are held and firmly bound unto Sam Macri, Don Macri, Joe Macri, d/b/a Macri Company, and the Continental Casualty Company, a corporation, and to M. C. Schaefer, an individual, d/b/a Concrete Construction Company, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 24th day of July, 1947.

The Condition Of This Obligation Is Such, that Whereas, the above named Plaintiff, M. C. Schaefer, d/b/a Concrete Const. Co., on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendant, Sam Macri, Don Macri and Joe Macri and the Continental Casualty Co., above named, in the amount of \$56,764.97, and for Plaintiff's costs in the amount of \$921.70, plus \$1.00 damages and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said amounts plus \$1,750.00 attorneys fees.

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay M. C. Schaefer,

an Individual d/b/a Concrete Construction Company, Sam Macri, Don Macri, and Joe Macri, and the Continental Casualty Company, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,
CLYDE PHILP,
MANUFACTURERS
CASUALTY INSURANCE
COMPANY,

[Seal] By A. A. NAEF,
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947. [101]

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE
PHILP'S DESIGNATION AND CON-
TENTS OF RECORD ON APPEAL

Come now appellants, A. J. Goerig and Clyde Philp, designated hereinabove as defendants and designate the following pleadings and proceeding and evidence which they wish prepared for transmission to the Circuit Court of Appeals in connection with the appeal heretofore filed in the above cause.

1. Answer of A. J. Goerig and Clyde Philp.

2. Recorder's transcript of testimony of A. J. Goerig.

3. Deposition of Clyde Philp.

4. Exhibit 7. Joint venture agreement with respect to 1062.

5. Exhibit 8. Joint venture agreement with respect to 1068.

6. Exhibit 9. Termination Agreement.

7. Exhibit 10. Application for bond with respect to 1062.

8. A. J. Goerig and Clyde Philp's Notice of Appeal.

9. A. J. Goerig and Clyde Philp's Statement Points on Appeal.

10. Bond on Appeal. [102]

11. Exhibit 59. Certificate of assumed business name.

Respectfully submitted,

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorney for Respondents.

Service accepted and copy received of appellants' designation of contents of record of appeal.

Dated July 29, 1947.

EUGENE D. IVY,

Attorneys for Respondents.

[Endorsed]: Filed July 29, 1947. [103]

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE
PHILP'S STATEMENT OF POINTS ON
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself and were not partners of Macri & Company at the time thereof.

2. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

3. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

4. The "silent" partnership was terminated prior to attaching of liability on the bond.

5. Parties to a contract can modify or alter same—or rescind it—even tho there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon. [104]

6. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even tho, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in refusing to grant A. J. Goerig and Clyde Philp a new trial for the same reasons set forth in the last preceding paragraph.

KENNETH C. HAWKINS,
NAT. U. BROWN,
Attorneys for Appellants.

Copy rec'd.

/s/ HARRY OLSON,
Atty. for M. C. Schaefer.

[Endorsed]: Filed July 30, 1947. [105]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Washington,
County of Yakima—ss.

Kenneth C. Hawkins, being first duly sworn on oath deposes and says: That at all times hereinafter mentioned he was and now is a citizen of the United States and of the State of Washington and a resident of Yakima County in said State, above the age of twenty-one years and not a party to, or in any way interested in the above named action, and competent to be a witness therein; that he received copies of appellants' A. J. Goerig and Clyde Philp's

Designation of Contents Of Record Of Appeal and Statement Of Points On Appeal in the above matter on the 29th day of July, 1947, and on said date caused the same to be served by delivering same to Eugene Ivy, Attorney for the Continental Casualty Company, and Harry L. Olson, Attorney for use plaintiff, and by depositing same in the Post Office at Yakima, Washington, addressed to 'Thomas Holman, of Brethorst, Holman, Fowler & DeWar, Hoge Building, Seattle 4, Washington, attorney for defendants Macri, the same being sent by [106] regular mail with sufficient postage affixed in the manner required by law.

/s/ KENNETH C. HAWKINS.

Subscribed and sworn to before me this 4th day of August, 1947.

[Seal] /s/ DOROTHY ESCHBACH,

Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed Aug. 4, 1947. [107]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Sam Macri, Don Macri and Joe Macri, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on the 1st day of May, 1947, and after entry of order denying motions for new trial on the 20th day of May, 1947.

S. W. BRETHORST,
TOM W. HOLMAN,
THOMAS N. FOWLER,
WARREN L. DEWAR,

Attorneys for Appellants Sam
Macri, Don Macri and Joe
Macri.

Copy mailed to Harry L. Olson, Eugene D. Ivy and Brown & Hawkins this 18th day of August, 1947.

A. A. LaFRAMBOISE,
Clerk.

By THOMAS GRANGER,
Deputy.

[Endorsed]: Filed Aug. 18, 1947. [108]

[Title of District Court and Cause.]

BOND ON APPEAL TO CIRCUIT COURT OF
APPEAL, NINTH DISTRICT

Know All Men By These Presents, That we, Sam Macri, Don Macri and Joe Macri, as Principals and Maryland Casualty Company, as Surety, are held and firmly bound unto the United States of America for the use of M. C. Schaefer, plaintiff in the above entitled action and appellee upon appeal therefrom and for the use and benefit of the other defendants named in said action, as interest may appear under the terms and conditions hereinafter stated in the just and full sum of Two Hundred and Fifty and No/100 Dollars (\$250.00) lawful money of the United States of America.

Dated this 15th day of August, 1947.

The condition of the foregoing obligation is such that,

Whereas, Sam Macri, Don Macri and Joe Macri have appealed to the U. S. Circuit Court of Appeals, Ninth District from a judgment entered in the above entitled action by the District Court of the United States for the Eastern District of Washington, Southern Division.

Now, Therefore, if the said Sam Macri, Don Macri and Joe Macri shall pay and fully satisfy all costs, if the appeal by them is dismissed or if the aforesaid judgment is affirmed, or shall pay such costs as the said U. S. Circuit Court of Appeals for the Ninth District may award if said judgment is

modified, then this instrument shall be null, void and of no effect; otherwise of full force and virtue.

/s/ SAM MACRI,
/s/ DON MACRI,
/s/ JOE MACRI,
MARYLAND CASUALTY
COMPANY,

[Seal] By H. T. HANSEN,
Attorney-in-Fact.

[Endorsed]: Filed Aug. 18, 1947. [109]

[Title of District Court and Cause.]

APPELLANTS SAM MACRI, DON MACRI
AND JOE MACRI'S STATEMENT OF
POINTS ON APPEAL

1. The United States District Court was in error in entering any judgment against the defendants Sam Macri, Don Macri and Joe Macri in favor of the use plaintiff, M. C. Schaefer; and,

2. The United States District Court was in error in refusing to enter judgment in favor of the defendants Sam Macri, Don Macri and Joe Macri against the use plaintiff, M. C. Schaefer, as prayed in the defendants' answer and cross-complaint to the amended complaint, for the following reasons:

- (1) The relationship between said defendants and said use plaintiff were contractual and based on written contracts and subcontracts

in evidence as plaintiff's Exhibits 1, 2, 3, 4, 5 and 6, which were not in any manner abrogated, superseded or rendered nugatory;

- (2) There was a failure of all competent proof of any amount to support the judgment entered in favor of the use plaintiff because original book entries were not either introduced or supported by testimony of anyone making entries therein;

3. The United States District Court was in error in refusing to enter judgment in favor of the Defendants Sam Macri, Don Macri and Joe Macri against the use plaintiff, M. C. Schaefer, as prayed in said defendants' answer and cross-complaint, on the ground and for the reason that under the aforesaid written [110] contractual arrangements shown by plaintiff's Exhibits 1, 2, 3, 4, 5 and 6 there was failure of compliance with the contractual undertakings of the said use plaintiff as provided for thereby;

4. The United States District Court was in error in refusing to enter judgment in favor of the defendants Sam Macri, Don Macri and Joe Macri against the defendants A. J. Goerig and Clyde Philp, as prayed in the answer and cross-complaint of said defendants Macri to the amended complaint, for the reason that the joint venture agreements, defendants' Exhibits 7 and 8, applied, when read with the termination of joint venture agreements shown by defendants Goerig and Philp's Exhibit 9,

to hold the said defendants, Sam Macri, Don Macri and Joe Macri, free from loss sustained in performance of the principal contracted work called for by plaintiff's exhibits 1 and 2; and

5. The United States District Court was in error in refusing to dismiss the action of the use plaintiff, M. C. Schaefer, on the ground and for the reason that the said use plaintiff had not, at time of commencement of the action or at all until after challenge to such use plaintiff's legal capacity to sue, filed any certificate of assumed trade name for doing business as Concrete Construction Company, which was finally admitted, over objections, as plaintiff's Exhibit 59.

Respectfully submitted,

S. W. BRETHORST,

TOM W. HOLMAN,

THOMAS N. FOWLER,

WARREN L. DEWAR,

Attorneys for Appellants Sam
Macri, Don Macri and Joe
Macri.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 18. 1947. [111]

[Title of District Court and Cause.]

APPELLANTS SAM MACRI, DON MACRI
AND JOE MACRI'S DESIGNATION OF
CONTEXT OF RECORD TO BE SUPPLE-
MENTED ON APPEAL

Come Now the appellants Sam Macri, Don Macri and Joe Macri, hereinabove designated as defendants, and designate the following pleadings, proceedings and evidence which they wish prepared for transmission to the United States Circuit Court of Appeals for the Ninth Circuit in connection with the appeal heretofore filed by them in the above cause, namely:

1. Answer and cross-complaint of defendants Sam Macri, Joe Macri and Don Macri to the amended complaint of plaintiff, verified June 6, 1946;

2. Plaintiff's amended reply and cross-complaint to the cross-complaint of the defendants Macri;

3. Cross-complaint of defendants Clyde Philp and A. J. Goerig against the defendants Macri;

4. Bill of particulars of the defendants A. J. Goerig and Clyde Philp;

5. Answer of defendants Sam Macri, Don Macri and Joe Macri to cross-complaint of defendants Clyde Philp and A. J. Goerig;

6. Reply of defendants A. J. Goerig and Clyde Philp to answer and cross-complaint of the defendants Macri;

7. Proposed findings of fact, conclusions of law and judgment as proposed and submitted to the District Court by the defendants Sam Macri, Don Macri and Joe Macri; [113]

8. Alternate proposal if foregoing proposed findings of fact and judgment be not entered, as proposed and submitted to the District Court by the defendants Sam Macri, Don Macri and Joe Macri;

9. Notice of appeal by appellants Sam Macri, Don Macri and Joe Macri;

10. Bond for costs on appeal by said appellants Macri;

11. Supplemental order from the United States Circuit Court of Appeals, Ninth Circuit, directing Clerk of the U. S. District Court, astern District of Washington, Southern Division, to transmit additional records, exhibits and certification to such Circuit Court;

12. Statement of points on appeal by the appellants Sam Macri, Don Macri and Joe Macri;

13. Recorder's transcript of all proceedings, other than final arguments, not previously prepared for certification and transmittal to the United States Circuit Court of Appeals, Ninth Circuit;

14. All exhibits admitted and all exhibits proffered and rejected not heretofore certified and transmitted by the Clerk of the said District Court to the United States Circuit Court of Appeals, Ninth Circuit, and

15. Any depositions admitted and received in evidence and not previously transmitted by the Clerk of said District Court to the United States Circuit Court of Appeals, if not included in the transcript of testimony.

Respectfully submitted,

S. W. BRETHORST,
TOM W. HOLMAN,
THOMAS W. FOWLER,
WARREN L. DEWAR,

Attorneys for Appellants Sam
Macri, Don Macri and Joe
Macri.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 18. 1947. [114]

[Title of District Court and Cause.]

APPELLANT'S SUPPLEMENTAL
DESIGNATION OF RECORD

Comes now the appellant, Continental Casualty Company, a corporation, and in addition to the record heretofore designated by it, hereby designates the following to be added to the record herein for transmission to the Circuit Court of Appeals:

Order entered herein by the above entitled court in June, 1947, extending time for filing record on appeal, and this supplemental designation.

EUGENE D. IVY
ELWOOD HUTCHESON,
Attorneys for Appellant,
Continental Casualty
Company.

Copy received this 19th day of August, 1947.

OLSEN & PALMER,
Attorneys for use of
M. C. Schaefer.

BROWN & HAWKINS,
Attorneys for Defendants,
Goerig and Philp.

[Endorsed]: Filed Aug. 19, 1947. [116]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Civil Action No. 246

THE UNITED STATES OF AMERICA for the
use of M. C. SCHAEFER, an individual doing
business as Concrete Construction Company,
Appellee,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, individuals
and co-partners doing business as Macri Com-
pany, and Continental Casualty Company, a
corporation,

Appellants.

ORDER EXTENDING TIME TO FILE
SUPPLEMENT OF RECORD

Based on the application of the appellants Sam Macri, Don Macri and Joe Macri, notice of appeal to the above-entitled court by whom was entered after certification by the Clerk of the District Court for the Eastern District of Washington, Southern Division, to the above-entitled Circuit Court of a transcript of record on appeal, based on the appeals by the appellants Continental Casualty Company and A. J. Goerig and Clyde Philp from Civil Action No. 246 in said District Court; and the court deeming it proper that additional extension of time should be made supplementing the order extending time entered in said Civil Cause No. 246 by the

United States District Judge on June 18, 1947, in order to allow for the preparation, certification and transmittal to the above-entitled court of the additional matters required by said additional appellants; and for good cause shown;

Now Therefore, the above-entitled court, on its own motion, does hereby extend the time for preparation and docketing of the additional record on appeal in said cause for a period of 50 days from date of filing this order within which to certify and transmit the same by the Clerk of the United States District Court for the Eastern District of Washington, Southern Division; and [117]

It Is Further Ordered that a copy of this order, duly attested, be transmitted to the Clerk of the said District Court.

Dated this 18th day of August, 1947.

FRANCIS A. GARRECHT,

Judge of the above-entitled
Court.

[Endorsed]: Filed Aug. 18, 1947. Paul P. O'Brien, Clerk.

A true copy.

Attest: Aug. 18, 1947. Paul P. O'Brien, Clerk;
by F. T. Schmid, Deputy Clerk. [118]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

No. 246

THE UNITED STATES OF AMERICA for the
use of M. C. SCHAEFER, an individual doing
business as Concrete Construction Company,
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, individuals
doing business as Macri Company, and CON-
TINENTAL CASUALTY COMPANY, a cor-
poration,

Defendants.

ORDER DIRECTING CLERK TO TRANSMIT
EXHIBITS TO CIRCUIT COURT OF AP-
PEALS

Based on the application of the defendants, Sam Macri, Don Macri, and Joe Macri, and in furtherance of their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, it is

Ordered that the Clerk of the above-entitled Court be, and he is hereby, directed to send the originals of the following exhibits to the Clerk of the said United States Circuit Court, at San Francisco, California, namely:

Plaintiff's Exhibits: 4, 6, 41, 42, 43, 45, 46, 47, 48, 64, 70, 90, 123, and 129.

Defendants Macris' Exhibits: 15-a, 34, 35, 50, 50-a, 67, 74, 77, 78, 81, 82, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, and 116.

Defendants Goerig and Philp's Exhibit: 122.

Identifications: 72 and 120.

Dated this 12th day of September, 1947.

SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Sept. 12, 1947. [119]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11707

THE UNITED STATES OF AMERICA for the
use of **M. C. SCHAEFER**, an individual doing
business as Concrete Construction Company,
Appellee,

vs.

**SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG** and **CLYDE PHILP**, individuals
and co-partners doing business as Macri Com-
pany, and **CONTINENTAL CASUALTY
COMPANY**, a corporation,
Appellants.

**ORDER EXTENDING TIME TO FILE
SUPPLEMENT OF RECORD**

Based on the application of the appellants Sam Macri, Don Macri, and Joe Macri, notice of appeal to the above-entitled court by whom was entered after certification by the Clerk of the District Court for the Eastern District of Washington, Southern Division, to the above-entitled Circuit Court of a transcript of record on appeal, based on the appeals by the appellants Continental Casualty Company and A. J. Goerig and Clyde Philp from Civil Action No. 246 in said District Court; and the court deeming it proper that additional extension of time should be made supplementing the order extending time entered in said Civil Cause No. 246 by the

United States District Judge on June 18, 1947, and the order extending time to file supplement of record entered herein by the Honorable Francis A. Garrecht, Judge of the above entitled court, on the 18th day of August, 1947, in order to allow for the preparation, certification and transmittal to the above-entitled court of the additional matters required by said additional appellants; and for good cause shown;

Now, Therefore, the above-entitled Court, on its own motion, does hereby extend the time for preparation and docketing of the additional record on appeal in said cause for a period of 40 days from date of filing this order within which to certify and transmit the same by the Clerk of [120] the United States District Court for the Eastern District of Washington, Southern Division; and

It Is Further Ordered that a copy of this order, duly attested, be transmitted to the Clerk of the said District Court.

Dated this 29th day of September, 1947.

WILLIAM DENMAN,

Judge of the above-entitled
Court.

[Endorsed]: Filed Sept. 29, 1947. Paul P. O'Brien, Clerk.

A true copy.

Attest: Sept. 29, 1947. /s/ Paul P. O'Brien, Clerk.

[Endorsed]: Filed U.S.D.C. Oct. 2, 1947. [121]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 246

THE UNITED STATES OF AMERICA for the
use of M. C. SCHAEFER, an individual doing
business as Concrete Construction Company,
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, individuals
and co-partners doing business as Macri Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a corporation,
Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Before: Honorable Sam M. Driver,
United States District Judge.

Appearances:

Harry L. Olson, of Yakima, Washington, for
plaintiff.

Tom W. Holman, of Seattle, Washington, for de-
fendants Macri.

Kenneth C. Hawkins, of Yakima, Washington,
for defendants Goerig and Philp.

Eugene D. Ivy, of Yakima, Washington, for de-
fendant Continental Casualty Company. [122]

Be It Remembered, that on the 24th day of Feb-
ruary, 1947, the above entitled cause came regularly

on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the plaintiff appearing by Harry L. Olson, of Yakima, Washington; the defendants Sam Macri, Don Macri, and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; and the defendant Continental Casualty Company, a corporation, appearing by Eugene D. Ivy, of [123] Yakima, Washington;

Whereupon, the following proceedings were had and done, to-wit:

(Mr. Olson on behalf of the plaintiff waived his demand for a jury trial, and the case proceeded to trial before the Court without a jury.)

Mr. Holman: For the purpose of the record, in connection with the five cases, 250, 251, 257, 267, and there is one other, I don't recall the number, and this case, and in connection with the matter of the question which was asked Mr. Macri as to a claim made against the government for losses, after a protracted long distance conversation which I finally was able to make last evening, I find that the firm of Depew and Ferguson of Seattle are the ones that made the claim, and in that connection, at my request, this morning they have sent this

telegram, which was my suggestion as the best way to get the information to the Court.

The Court: Have you seen this telegram, Mr. Hawkins?

Mr. Hawkins: Yes, I have, your Honor. I might state that Mr. Goerig is bringing a copy of that claim and also a copy of the assignment, from Mr. Henry's office this afternoon; probably be here about two or three o'clock. [124]

Mr. Holman: Similarly, your Honor, with respect to the question of the assignment made by Mr. Macri, I also talked with Mr. Henry last night and he promised to send some wire this morning that I could present to your Honor.

The Court: Just so I get it before this case is concluded.

Mr. Holman: One other thing, your Honor; Mr. Olson and I both concur that Mr. Pease, the head of the Reclamation Office, who was subpoenaed by me and is here this morning, I had the subpoena set for the 24th figuring we would be ready to go, has charge of the entire work here, and his proof is formal only, and I wonder if everybody would concede and waive everything ahead, and let this witness testify?

Mr. Olson: Do you want to put it in before our opening statement?

Mr. Holman: I think you can make your statement if you wish.

Mr. Olson: I would just as soon put him on first, if you want to. I'm not going to make a lengthy statement.

The Court: Before we proceed with the opening statement I think it would be helpful to state your positions, so any statements counsel may make will be [125] brought out. Also, as to the mechanics, we really have, so far as Schaefer and Macri is concerned, two lawsuits in one here. Is there any thought of separating those? I suppose your evidence will be inter-related so that many witnesses will testify as to both of them?

Mr. Holman: That's right.

The Court: Well, we'll just proceed, then, and try to keep them as straight as we can. I think it would be helpful to be sure to have your witnesses testify which specification this relates to, if there is any doubt about it.

(Whereupon, Mr. Olson made an opening statement to the Court on behalf of the plaintiff.

(Whereupon, Mr. Holman made an opening statement to the Court on behalf of the defendants Macri.

(Whereupon, Mr. Hawkins announced that he was reserving his statement on behalf of the defendants Goerig and Philp until the conclusion of the plaintiff's case.

(Whereupon, Mr. Ivy made an opening statement to the Court on behalf of the defendant Continental Casualty Company.)

The Court: We will recess for a few minutes, and then you can put on your witness out of order, Mr. Holman. [126]

(Short recess.)

(All parties present as before, and the trial was resumed.)

Mr. Holman: May I call Mr. Pease, your Honor?

The Court: Yes, you may call him now. I assume there will be a considerable number of exhibits in this case, and we decided this would be a good time to try out the method of using consecutive numerical numbers for the exhibits, regardless of whoever introduces them. The exhibits will run from 1 up, and then we will specify which party has introduced it. I understand this is a witness for the defendants Macri, called out of order for convenience?

Mr. Holman: That is right.

H. W. PEASE

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name, your place of residence, and your official occupation with the Bureau of Reclamation?

A. My name is Harold W. Pease, my place of residence is 608 South 19th Avenue, Yakima, and

(Testimony of H. W. Pease.)

I am construction engineer for the Roza Division of the Yakima Project.

Q. Mr. Pease, in that capacity you have in your official possession certain of the documents pertaining to [127] specification 1062, subdivision 1, and 1068 on the Roza Project, have you not?

A. I have.

Q. And you brought those with you?

A. I did.

Q. Now, are those official government records and documents? A. They are.

Mr. Holman: Your Honor, and counsel, all counsel, I am wondering if it would be satisfactory to the Court and appropriate as between ourselves to have those documents identified, and when introduced, then retained for the purpose of trial, but with the requirement that we may substitute copies, so that the government will not be deprived of their original records.

The Court: Yes, I see no reason why that could not be done. There is no question of genuineness of signatures, I assume. Is there any objection? It will be understood, then, that as to all documents identified by this witness, the originals may be withdrawn and copies substituted.

(Testimony of H. W. Pease.)

Direct Examination
(Continued)

By Mr. Holman:

Q. Now, under your Bureau regulations, that may be done without conflict with your office?

A. So far as I know, yes.

Q. Well, then, Mr. Pease, may I assist you to present the [128] various documents to be identified? You were subpoenaed by the defendant, Mr. Pease. Would you produce your copy of the subpoena and with reference to the various documents referred to there, present them, so that they may be marked?

A. Well, the first that is called for under 1062 is the daily reports of inspectors.

The Court: I just had this thought; these documents here that are involved in this case, and also in the others tried before, it would be more convenient for the Court, I think, if they were numbered first, and I would know always where to find them; they would be at the beginning of this long list, and is there any objection to our marking these consecutively as they were offered in the pretrial conference, and then they can be offered later?

Mr. Holman: No objection.

The Court: Then we can number these Mr. Holman is about to introduce where these leave off. That doesn't mean they will be admitted now. They will be numbered, and they can be offered later.

(Testimony of H. W. Pease.)

(Whereupon, contract and bond #1062 was marked Plaintiff's Exhibit No. 1 for identification.

(Whereupon, contract and bond #1068 was marked Plaintiff's Exhibit No. 2 for identification. [129]

(Whereupon, specification #1062 was marked Plaintiff's Exhibit No. 3 for identification.

(Whereupon, specification #1068 was marked Plaintiff's Exhibit No. 4 for identification.

(Whereupon, subcontract on specification #1062 was marked Plaintiff's Exhibit No. 5 for identification.

(Whereupon, subcontract on specification #1068 was marked Plaintiff's Exhibit No. 6 for identification.

(Whereupon, Joint Venture Agreement on #1062 was marked Defendant Macris' Exhibit No. 7 for identification.

(Whereupon, Joint Venture Agreement on #1068 was marked Defendant Macris' Exhibit No. 8 for identification.

(Whereupon, Termination of Joint Venture Agreements was marked Defendants Goerig and Philp's Exhibit No. 9 for identification.

(Whereupon, Application for bond on #1062 was marked Defendant Casualty Company's Exhibit No. 10 for identification.

(Whereupon, Application for bond on #1068 was marked Defendant Casualty Company's Exhibit No. 11 for identification.

(Testimony of H. W. Pease.)

(Whereupon, Structure Layout Specification #1062 was marked Plaintiff's Exhibit No. 12 for identification.) [130]

Mr. Holman: May it be stipulated that throughout the record here, where we speak of 1062, we are identifying 1062, Schedule 1, only?

Mr. Olson: That's right.

Mr. Holman: It will just save a lot of talk, your Honor.

Mr. Olson: I agree with counsel, and so stipulate.

(Whereupon, the reporter read the last previous question.)

A. The first thing on this is daily reports of inspectors on said contract, that's 1062. Here are the daily reports of inspectors.

Mr. Holman: I ask that that be marked for identification, your Honor.

The Court: Do you want it all marked as one identification?

Mr. Holman: Yes. Actually, as a practical proposition, counsel and the Court, there will be reference to only the portions that pertain to Schedule 12 and excavation, out of those.

(Whereupon, Daily Inspection Reports, #1062, was marked Defendant Macri's Exhibit No. 13 for identification.)

A. Then monthly estimates of progress for compensation.

(Testimony of H. W. Pease.)

Q. On 1062? [131]

A. 1062; these are all 1062 until further notice.

Mr. Holman: I ask that it be marked the next number, please.

(Whereupon, Monthly Estimate of Progress for Compensation was marked Defendant Macri's Exhibit No. 14 for identification.)

A. Payrolls of the Macri Company, principal contractor, and M. C. Schaefer, doing business as Concrete Construction Company as sub-contractor, still on 1062.

Q. First will be the Macri payrolls.

A. Here is Macri payrolls.

(Whereupon, Macri weekly payroll reports was marked Defendant Macri's Exhibit No. 15 for identification.)

A. And here's the Concrete Construction Company payrolls.

Q. That is the Schaefer payrolls?

A. Schaefer, Concrete Construction.

(Whereupon, Schaefer weekly payroll reports was marked Defendant Macri's Exhibit No. 16 for identification.)

A. Then the monthly concrete control reports for the period from April, 1944, through April, 1945, which are in here, with other concrete control reports to bring it up to date.

(Whereupon, Monthly Concrete [132] Control report #1062 and #1068 was marked

(Testimony of H. W. Pease.)

Defendant Macri's Exhibit No. 17 for identification.)

The Court: Just a minute, please. What did you say this was?

A. That is monthly concrete control reports. It covers much more than the period asked for; and concrete inspectors' daily reports from XD 1975, for specifications 1062-1, as filed in the Sunnyside office.

Q. Would you give that XD number, please?

A. XD 1975.

(Whereupon, Concrete Inspectors' Daily reports, #1062, was marked Defendant Macri's Exhibit No. 18 for identification.)

A. Then, for specifications 1068, first, daily reports of inspectors on said contract.

The Court: That's number 1068?

A. Yes, sir.

(Whereupon, Daily inspection reports on #1068 was marked Defendant Macri's Exhibit No. 19 for identification.)

A. Monthly estimates of progress for compensation.

(Whereupon, Monthly estimates of progress for compensation on #1068 was marked Defendant Macri's Exhibit No. 20 for identification.) [133]

The Court: Is that on 1068?

A. Yes.

(Testimony of H. W. Pease.)

The Court: You will continue on 1068 until you tell us to the contrary, is that understood?

A. Yes; then payrolls of Macri and Company.

(Whereupon, Macri weekly payroll report on specification 1068 was marked Defendant Macri's Exhibit No. 21 for identification.)

A. Monthly concrete control reports for the months during which said contract was in stage of performance—which are contained in this file.

Q. That would be contained in the identification 18——

Clerk: 17.

Q. Yes, thank you. Why couldn't 17, your Honor, be marked both 1062 and 1068?

The Court: Are all of those monthly concrete reports in that file that is marked 17?

Mr. Holman: They are, your Honor.

The Court: I don't see any sense of giving it two numbers, though. It will be understood that that identification 17 covers the monthly concrete reports for both 1062 and 1068.

Mr. Holman: That's right.

The Court: And it covers April, 1944 to April, 1945. [134]

Witness: Actually the last one in here is February 6, 1947, and I don't know what the earliest date is.

The Court: It more than covers the period involved here?

A. It more than covers the period involved. February 8, 1941, is when it starts.

(Testimony of H. W. Pease.)

The Court: It is understood, then, that Macri's Identification 17 covers both specifications 1062 and 1068.

Q. (By Mr. Holman): Did you bring a monthly estimate of progress for compensation, for 1068?

A. Yes. I don't remember which one that is.

Q. That's all right; I have it.

Clerk: It is number 20.

A. Number 20.

Q. Now, Mr. Pease, will you please state whether or not you were in charge of the principal office for this work on the Roza Project as encompassed within 1062 and 1068 during its performance, or were you away?

A. I was not here at that time.

Mr. Holman: I think that's all, counsel. I will have other government witnesses who were here.

Mr. Olson: I would like to ask a couple of questions. These concrete control reports, what do they purport to show? [135]

Mr. Holman: Well, if you want that, I would like to continue with direct, then. I'll save a lot of time for you.

Mr. Olson: I don't care.

Mr. Holman: I will continue my direct examination.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you then now, please, Mr. Pease, starting out with the first one marked, which was 13,

(Testimony of H. W. Pease.)

just briefly tell the Court the function of those in connection with the office of the Bureau of Reclamation, and go on down through the list, just for the purpose of the record?

A. Well, each inspector turns in a daily inspection report. The report is headed "Inspector's Daily Report" and at the top of it it shows the shift, the hours of work, foreman, date, station, and the specification, the equipment, the accomplishment, the remarks, if any, and the inspector's name at the bottom. That is shown in these inspection reports regardless of the type of work being done.

Q. Thank you. Now, that is a report from whom to whom?

A. That is the report from the inspector in the field where the job is going on, to the office.

Q. Thank you; and what would that office be? Would you call that the District Office, or what is the name of it?

A. It is the construction office, the Division Office, so [136] called because the work is being done on the Roza Division of the Yakima Project.

Q. All right, thank you, sir. Then what with respect to 14, the estimate of progress for compensation?

A. This shows by items the estimate number, the contractor, the specifications number, the month, the contract symbol number, and the date of the contract, then is tabulated below and on succeeding pages the various items of work accomplished dur-

(Testimony of H. W. Pease.)

ing that month, the work accomplished, that is, the quantities, payment quantities, during the previous month, the total to date, the unit of measurement, the unit price, and then the total earned.

Q. And does it also show deductions, if any, that are made? A. The which?

Q. Does it also show if there are any deductions made?

A. Yes, on page 2 there's a sub-total, then it shows the gross amount earned, the amount retained under the contract, the previous payments, if any, previous deductions, deductions this month, total deductions, and amount due.

Q. You say the amount retained under the contract; was that at a fixed percentage?

A. That is.

Q. What?

A. I believe it is 10 per cent. In other words, it will be provided, it is provided, in the specifications, and I [137] believe also in the contract.

Q. Mr. Pease, is that what is commonly known as the retained percentage in contracts?

A. Yes, it is.

Q. Would you then take up with respect to Macri's 15?

A. This is a certified copy of the payroll, the top one appearing to be number 59, for the week ending April 18, 1945.

Mr. Olson: This is Macri's payroll?

A. That is Macri's payroll. I assume that they are all here.

(Testimony of H. W. Pease.)

The Court: How often are those reports put in?

A. These are weekly. It requires under the contract that the contractors pay the employees weekly.

Q. Mr. Pease, in furtherance of your office reception and filing of payrolls, certified payrolls, what is the purpose for your office, with respect to them?

A. The payrolls are filed in conformity with a provision of the specifications, for checking to ascertain that the contractor is not paying less than prescribed minimum wages as set forth in the specifications.

Q. Any other function?

A. Not so far as I know.

Q. Then, would that hold true also for the other payrolls that you've put in, in each instance it would be the same thing? [138]

A. Yes.

Q. In other words, I'm talking now about the Schaefer payrolls, number 16, which is a sub-contractor's payroll. That would be the same purpose, would it not? A. Same purpose.

Q. Would it have any other purpose?

A. Not so far as I know.

Q. And that would also be true as to Macri's payroll on 1068. Then what with respect to Exhibit 17, Mr. Pease? A. What is that?

The Court: That is the concrete control reports.

A. All right. This is Concrete Construction Company. He mentioned this. It is the self-same purpose as the other.

(Testimony of H. W. Pease.)

The Court: You spoke of the Macri payroll, but I notice it is entitled "Sub-contractor payroll".

Q. We covered that; that's 16.

A. What was your question about this concrete control report?

Q. Would you make the same explanation with respect to those?

A. That is simply to show with relation to the concrete placed each month a summary of the concrete placed and the operations that were performed during the month, not in detail, but in general.

Q. Now, are those originals or copies of reports that have been sent from the division office to other offices?

A. These are carbon copies, the originals having been sent [139] to the Chief Engineer at Denver.

Q. And where would he be?

A. At Denver.

Q. Thank you. Then 18, please, would you make your explanation as to it, along the same line? Concrete Inspector's Daily, XD 1975.

Mr. Olson: Would you give me the title of that, please? I didn't get it before, the way you did before.

A. I'll find XD 1975 first.

Q. It is printed on the form, as I remember it.

A. Yes, it is, down on the lower left hand corner. Most numbers are not. This is Concrete Inspector's Daily Report. It shows the project and the feature, the contractor, the shift, mixer,

(Testimony of H. W. Pease.)

type of make, and various other things here. I doubt very much if you would be interested in everything that shows on it.

Mr. Olson: That XD is what was bothering me.

A. Don't ask me why; I don't know. It's just a designation.

Mr. Olson: It doesn't designate any particular structure, then?

A. No, it is a form number.

Q. Then with reference to those entries at the right hand side of the blank tabulation form, where cubic yardage is shown, what is the purpose of that?

A. This is the amount that passed through the mixer. [140]

Q. Would you amplify that just a little; "Passed through the mixer"; what does that mean?

A. There, for some reason unknown to me entirely, is always an over-run in quantity passed through the mixer over what the pay quantities are; it may be due to any one of a whole lot of causes.

Q. So that is not a computation for purpose of determining pay at all? A. No.

Q. Thank you very much.

A. It is for calculation of over-run, if any.

Q. May I indicate to the Court from this exhibit here that purpose? This cubic yards, your Honor, for the first shift was 5.379. Those are the items I'm speaking of.

(Testimony of H. W. Pease.)

The Court: That is on the right hand column of the sheet. Yes, I see.

Q. Then would you make your explanation with respect to Macri's 19 for identification?

A. This is a similar sheet of inspection reports, daily inspector's reports, for 1068, to that for 1062.

Q. Same purpose as you explained for 1062?

A. Same purpose.

Mr. Holman: I think that's all. Now, Mr. Olson.

Mr. Olson: Now I have no questions.

Mr. Holman: May the witness, your Honor, be [141] excused, with the consent of counsel?

The Court: Is there any objection?

Mr. Olson: I'm not sure that I have all these identifications. 21, as I understand, is Macri's payroll. What is 20?

Witness: Monthly estimate of progress for compensation on 1068.

Mr. Olson: I have no objection to Mr. Pease being excused, subject to call.

The Court: Are you stationed here, Mr. Pease?

Witness: Yes, but sometimes I'm not; I'm pretty hard to find, if you wanted me. If you can let me know in advance——

Mr. Holman: His office is within two blocks of here, and if we could notify him previously, he could be here the next day.

Witness: I could be here the next day, barring unforeseen happenings like a broken ditch, or something like that.

(Testimony of H. W. Pease.)

Mr. Holman: If that may be understood, then that will be all.

The Court: You hadn't planned any extended trip during the next week?

Witness: No, but I might be going down to see what is going on on some of the contracts. [142]

The Court: Well, it is understood that reasonable notice will be given to you, at least a day in advance, so that you can arrange your plans.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: Well, let's offer some of these exhibits.

Mr. Hawkins: I have only one question to ask concerning these exhibits. Who's going to assume the burden of making the copies?

The Court: That thought occurred to me. In case of appeal the Clerk makes copies of the exhibits to send up, ordinarily, to the Circuit Court of Appeals, but that is at the cost of the appellant, and I should think from a practical standpoint it would be wise to introduce only such of these as you plan to use, otherwise the bill for copying them would be very substantial indeed. I see what you had in mind, too, other than the matter of appeal. The government wants these originals back, and somebody will have to make copies to put in here so these can be released, whether there is an appeal or not.

Mr. Olson: I think it will develop there is a great bulk in here that will never be used, that is,

these daily inspection reports, the remarks that are made as to excavation are surprisingly lacking.

Mr. Holman: That's what I was going to say, if we could all stipulate that we can use these government exhibits without formally offering them, except insofar as we wish to substitute copies; then I think it would save a great deal of time; for instance, these payrolls.

The Court: Do you have copies ready of the ones that you want to use?

Mr. Holman: No.

Mr. Hawkins: I think the one offering the particular exhibit should make the copies.

The Court: I think that's fair enough.

Mr. Hawkins: That is, that big file there, if you're only going to offer five sheets out of it, we can all understand it comes from their original records, but only those five sheets are material.

Mr. Holman: In view of the fact there is no jury here, I might suggest the practical way would be to read from that into the record.

The Court: Well, in some instances that could be done, but where you have voluminous exhibits with figures in them, it wouldn't be practical.

Mr. Olson: I don't think we'll run into that very much. That would be the natural reaction from seeing that bulk of exhibits.

The Court: I think we should try to minimize using [144] these records as much as we can, and where we do, the one who offers will have the re-

sponsibility of reading into the record, if practical, or furnishing a copy if not; is that understood?

Mr. Holman: That is entirely satisfactory.

Mr. Olson: Plaintiff offers in evidence Plaintiff's Identification 1, being the certified copy of the main contract, 12R14825, and bond, covering specifications 1062.

The Court: Any objection?

Mr. Hawkins: No objection.

Mr. Holman: Not at all, your Honor.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was admitted in evidence.)

Mr. Olson: The plaintiff offers in evidence Plaintiff's Identification 2, being the contract number 12R14996 between the Department of the Interior and the Macri Company, together with bond, covering specifications number 1068.

The Court: It will be admitted. I will assume as to these identifications that come from the pre-trial conference, unless counsel wants to make a specific objection I'll assume that there is none. Just speak up if there is. [145]

(Whereupon, Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Mr. Olson: Plaintiff offers in evidence plaintiff's identification 3, Bureau of Reclamation specifications number 1062, covering earthwork, pipe lines and structures, laterals 59.3 to 59.8 and sub-laterals.

Mr. Holman: May it be stipulated, counsel, that the markings and underscoring in this should be disregarded by the Court?

Mr. Olson: I wouldn't want to stipulate that the Court disregard those matters underlined.

Mr. Holman: For instance, on page 1, your Honor, a lot of tabulations and the schedule is not filled out, which is shown in the contract anyway.

Mr. Olson: These figures that are written in here should be disregarded.

Mr. Holman: I object to this as not a complete copy of the specifications, until counsel puts in the bid amounts, the quantities, and the figure. They are blank. He can do that during the noon hour.

Mr. Olson: I have no objection if counsel wants to put those in, your Honor, for his doing so, but the specifications themselves covering this job are not—the amounts that Mr. Macri bid have got nothing to do with how the job is to be performed. If counsel's got a [146] completed copy of that, I've got no objection to it going in, if he wants it.

The Court: Well, I think it should be completed.

Mr. Holman: I'll be glad to have you complete it off of this. Subject to that, I will have no objection. I'll be glad to help you.

Mr. Olson: Well, that's a pretty fair deal. I am offering it for the purpose of showing what kind of excavations were to be made.

The Court: You had better fill those in, and renew the offer. The same would apply to identification 4, then.

Mr. Olson: Do you have the figures on that?

Mr. Holman: Yes.

Mr. Olson: Well, your Honor, I wonder if it could be admitted? Certainly they are admissible, when they were handed out to these people to show what they were to do.

Mr. Holman: If counsel wants to have them admitted as the specifications which controlled Schaefer's operations, I have no objection.

The Court: They will be admitted, and then if you wish to use those figures, they can be put in.

Mr. Olson: I'm perfectly willing they can be put in. [147]

Mr. Holman: And may I also have the undertaking from counsel that they will be cleaned up with regard to pencil notations on them?

The Court: I think those pencil notations could be erased. There aren't many of them, are there?

Mr. Holman: I don't think so, your Honor.

The Court: With that understanding, 3 and 4 will be admitted.

(Whereupon, Plaintiff's Exhibit No. 3 for identification was admitted in evidence.

(Whereupon, Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Mr. Olson: Plaintiff offers in evidence identification 5, being the sub-contract between Macri and Schaefer covering a portion of specifications 1062.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

Mr. Olson: Plaintiff offers in evidence plaintiff's identification 6, being the sub-contract between Macri and Company and the Concrete Construction Company covering a portion of specifications 1068.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 6 for identification was admitted in evidence.) [148]

Mr. Holman: Defendants Macri, your Honor, offer in evidence Macri's Identification 7, joint venture agreement on 1062.

Mr. Hawkins: Your Honor, the defendants Goerig & Philp object to the introduction of exhibit 7 into evidence. I notice it is 12 o'clock. Do you want to hear my objections at this time?

The Court: Well, I think we will recess until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, February 24, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, I was offering Macri's 7, and Mr. Hawkins indicated he would

have an objection, so I would like to also make an offer of Macri's 8, because I know his objection will run to both of them.

The Court: Yes, his objection will pertain to both of them, I assume.

Mr. Hawkins: Your Honor, the defendants Goerig and Philp object to the introduction into evidence of Exhibits 7 and 8 for identification. These exhibits constitute the joint venture agreements between the [149] Macris and Goerig and Philp. We object to the introduction of these in evidence for the reason that they are supplanted by Exhibit 9, the termination agreement, that takes the place of the joint venture agreements completely, and all of the rights of the parties arising out of the joint venture agreement are terminated and ended and modified, certainly, by the termination agreement, and it is the termination agreement alone on which the plaintiff or the defendants, under cross-complaints, can create any rights. We object to the introduction of those agreements in evidence, for the reason that they are incompetent and immaterial.

The Court: The objection will be overruled. I think the documents should all be in before the Court and construed together. Macri's 7 and 8 will be admitted.

(Whereupon, Defendant Macri's Exhibit No. 7 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 8 for identification was admitted in evidence.)

Mr. Hawkins: At this time, your Honor, the defendants Goerig and Philp offer in evidence Exhibit 9 for identification, the termination agreement.

The Court: It will be admitted.

(Whereupon, Defendants Goerig and Philp's Exhibit No. 9 for identification was admitted in evidence.) [150]

Mr. Olson: I think the record should show that the use plaintiff objects to its introduction on the ground that it is immaterial and has no binding effect on the use plaintiff, he not being a party to the document.

The Court: Yes, the record may show that. I will withdraw the admission and permit the objection to be put in ahead of the admission. It will now be admitted. The next two are the Continental Casualty Company exhibits. I assume Mr. Ivy will probably offer those later on. He had to go over to Superior Court, I understand, for a while, and we're to proceed in his absence. He'll be back after while.

Mr. Olson: Are you going to offer 12, then, Mr. Holman?

Mr. Holman: No. These will take evidence, from here on.

The Court: 12 is the layout. You're not ready for that yet, are you?

Mr. Holman: No, sir. Anything from here on down, I'll have to offer evidence.

The Court: You may as well proceed with your case, then.

Mr. Olson: Unless no one else has any objection to it.

Mr. Holman: Well, if it will accommodate you, fine, [151] put it in as your exhibit if you want.

The Court: You wanted the structure lay-out, Macri's 12, in evidence as to Schaefer in connection with your case?

Mr. Olson: Yes.

The Court: Is there any objection to it, Mr. Holman?

Mr. Holman: Not at all, your Honor.

The Court: It will be admitted in evidence, then, if there is no objection to it.

(Whereupon, the Structure Layout, Specification 1062, was admitted in evidence as Plaintiff's Exhibit 12.) [152]

M. C. SCHAEFER

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. M. C. Schaefer.

Q. Where do you reside?

A. Portland, Oregon.

Q. Are you the M. C. Schaefer on whose behalf this action is brought as plaintiff? A. I am.

Q. And what connection do you have, if any, with the Concrete Construction Company?

A. I'm the sole owner.

(Testimony of M. C. Schaefer.)

Mr. Holman: I want to object, your Honor, and it is purely a technical question; I would like to ask the witness a question, if I may, before that answer.

The Court: All right.

Mr. Holman: Have you filed a certificate of assumed trade name in Yakima County?

Witness: I have not [153]

Mr. Holman: I object to the answer to the question, then, your Honor.

The Court: I will overrule it. I don't believe that—is it your position, Mr. Holman, that filing a trade name is a condition precedent to bringing a suit in the Federal Court?

Mr. Holman: My position, your Honor, is that the Washington statute, the section of which I can cite you; I know your Honor is familiar with the section.

The Court: Yes.

Mr. Holman: Requiring when any person uses an assumed trade name, before he can sue with respect to that trade name he must comply with our statute, and Mr. Schaefer has shown by his answer that he has not complied and I think therefore he's estopped to proceed in this action, and that is not required, your Honor, as a matter of affirmative defense.

Mr. Hawkins: The defendants Goerig and Philp join in that motion.

The Court: I'll overrule the objection, and take up the question again in the final argument.

(Testimony of M. C. Schaefer.)

Mr. Holman: May I have an exception?

The Court: Yes.

Mr. Hawkins: If that's in the nature of an objection, I would like to put it in the form of a motion [154] for dismissal, because the witness's own testimony shows he's not entitled to maintain an action, and on behalf of the defendants Goerig and Philp I move that the action be dismissed.

Mr. Holman: I join in the motion.

The Court: The motion will be denied.

Mr. Holman: Exception.

The Court: Yes. It runs in my mind that the State statute provides specifically, does it not, that in order to maintain an action it will be necessary that one doing business under a trade name must first file the trade name. I think at some stage of this trial the question of whether that applies to a suit in Federal Court should be presented adequately. You may proceed.

(Whereupon, the reporter read the last previous question and answer on direct examination.)

Mr. Holman: I move the answer be stricken for the same reasons, also not the best evidence.

The Court: Overruled.

Mr. Holman: Exception.

The Court: Yes.

(Testimony of M. C. Schaefer.)

Direct Examination
(Continued)

By Mr. Olson:

Q. You may answer, Mr. Schaefer.

A. I'm the sole owner.

Q. Where is the Concrete Construction Company's place of [155] business?

Mr. Holman: Same objection.

The Court: Same ruling.

Mr. Holman: Exception.

A. 1635 South East 11th Avenue, Portland, Oregon.

Q. Now, you are the M. C. Schaefer who signed the sub-contract on the job known as specifications 1602 of the Bureau of Reclamation? A. I am.

Q. Now, can you explain, Mr. Schaefer, generally, for the Court's information, what the job 1062 consisted of; not just the part that you were to do, but a general description of the project?

Mr. Holman: Well, just a minute, may it please the Court, I object to that, except just for graphic description, so that we're not bound by his description of the job. He's not shown competent, yet, and qualified.

The Court: Well, I presume it is preliminary in nature.

Mr. Olson: Yes, your Honor. I can see your Honor could sit down and read these specifications. We would have to recess, probably, for several hours.

(Testimony of M. C. Schaefer.)

Mr. Holman: I'll withdraw the objection, your Honor, to save time.

The Court: Yes, all right. [156]

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, I'll withdraw the question for the time being, and ask you first what is the nature of your business?

A. Concrete and general construction.

Q. And how long have you been engaged in that business?

A. Well, I've been engaged in the construction business for approximately twenty-five years.

Q. And in connection with that business you make up bids and submit bids?

A. That's right.

Q. And interpret plans and specifications?

A. Yes.

Q. Now, are you familiar with the general scope of project or specifications 1062, that is involved here?

A. I am.

Q. Would you describe the project in general scope to the Court?

A. Well, more particularly as to the work that was to be done before we were to do our part of the construction work——

Mr. Holman: I move that that be stricken as not responsive.

(Testimony of M. C. Schaefer.)

The Court: It is not responsive. It will be stricken. The question was the general scope of the work [157] as a whole, I think.

A. Well, it's an irrigation project for the Bureau of Reclamation. The work involved was the excavating for ditches, excavating for pipe lines, placing of pipe, excavation for structures, placing of forms, the pouring of concrete in structures. The area involved I believe was in the neighborhood of forty miles of lateral. There was required that there be excavation, fine grading——

Mr. Holman: Just a minute, may it please the Court, I object to that type of answer as not the best evidence. The requirements are already in evidence as exhibits. If the witness is telling his own interpretation of it, that's one thing, but it certainly is not the best evidence.

Mr. Olson: Well, I hadn't asked for that just yet anyhow, but I will.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, with reference to specifications 1068, Mr. Schaefer, can you give us the general scope called for by those specifications?

A. It was the same general work as involved in 1062.

Q. And with reference to location, where was the area, the location or the situs where the work was to be performed in 1068 with reference to 1062?

A. It was next to it; it was a continuation, so to say. [158]

(Testimony of M. C. Schaefer.)

Q. And where was the general situs of the work—where is this work located, Mr. Schaefer, the situs of it? A. Near Sunnyside, Washington.

Q. Now, handing you plaintiff's Exhibit 5, Mr. Schaefer, which is the sub-contract covering 1062, would you tell the Court what was the nature of the work on 1062 that was to be performed by the Concrete Construction Company?

Mr. Holman: That I object to, your Honor. The document is the best evidence.

The Court: I will overrule the objection. I think I would like an explanation from the witness.

Witness: It was the doing of form work, the pouring of concrete, and the stripping of the forms, the furnishing of hardware, and the curing material was the only material that the Concrete Construction Company was to supply, and this work was in connection with the structure, chute, stilling pool, and separation structure.

Q. Referring to the sub-contract and to Article I, who was to furnish the form lumber?

Mr. Holman: Just a minute, your Honor. Purely the instrument speaks for itself there. I object to it. It seems to me that is for the Court to interpret from the wording of the instrument.

The Court: Yes, I think if there is any dispute about it. [159]

Mr. Olson: Well, I don't think there is, Mr. Holman, any dispute that Macri and Company—

Mr. Holman: The instrument speaks for itself.

(Testimony of M. C. Schaefer.)

The Court: I assume he was going to say Macri was going to furnish the lumber. If there is any question about that I'll have to read the contract.

Mr. Holman: No, there isn't. That's what he's going to say.

The Court: Perhaps we might save time here. The Court doesn't want to stop to read all these documents, and even if I did I wouldn't know what you wanted to call my attention to at the particular time. Why can't you call my attention to the portions you want, and then explain it as you go along, Mr. Olson?

Direct Examination
(Continued)

By Mr. Olson:

Q. Well, reading from Article I, your Honor, of the contract, the sub-contract, on 1062, it provides that all materials except form wire, nails, and curing material will be furnished by the general contractor or/and owner. Sub-contractor will furnish the above wire, nails, and curing material. Now, what is the form wire; what is that, Mr. Schaefer?

A. Well, if any, there was very little form wire used. Wire ordinarily would be used in tying the forms. In this case the Bureau requested that we use she-bolts. [160]

Mr. Holman: I didn't hear that last.

The Court: In this case they used she-bolts.

(Testimony of M. C. Schaefer.)

Mr. Holman: I thought he said the Bureau requested it; is that right? A. That's right.

Q. Now, the nails that were to be furnished by you, what were they for?

A. They were for building the panels and assembling the structures in the field.

Q. And the curing material, what did that consist of?

A. Curing material was for sealing the concrete from too rapid evaporation of the water, and for use as protection against frost.

Q. Now, referring to the plaintiff's Exhibit 3, and on schedule 1, which of those items were sub-contracted to you by the sub-contract on 1062?

A. Item 12.

Q. And what is that item?

A. That is concrete in structures; item 13——

Q. What is that item?

A. That is placing re-inforcement bars.

Q. What does that consist of, Mr. Schaefer?

A. There were certain of the structures that were re-inforced, requiring re-inforcing steel.

Q. That is in the concrete itself? [161]

A. That's right.

Q. All right; now, any other items there?

A. Item 16, installing gates and miscellaneous metal work.

Q. And what does that consist of?

A. Well, that is gates.

Q. Well, for what purpose?

A. That is attached to the concrete structure for controlling the amount of water going through

(Testimony of M. C. Schaefer.)

the structure, and for measuring the quantity of water that the farmer uses.

Q. Now, what was necessary to be done in the performance or in the completion of this project, Mr. Schaefer, in order to place these structure forms in place for the pouring of concrete?

A. There was excavation and fine grading previous to our going in and setting our forms.

The Court: Will you read the answer?

(Whereupon, the reporter read the last previous answer.)

Q. Now, what do you mean by fine grading, Mr. Schaefer?

A. Fine grading is to get the ground elevation at proper grade to receive the forms or the bottom of the structures.

Q. Now, handing you plaintiff's Exhibit 4, can you refer to what page or section refers to the excavation work?

The Court: What was that number, plaintiffs——

Mr. Olson: 4. [162]

A. Item 45 on page 21, "Excavation for structures."

Q. Would you read the portion of that that refers to the excavations?

(Whereupon the witness read item 45 on page 21 of Exhibit 4.)

Q. That is section 45 commencing on page 21 of plaintiff's Exhibit 4 of specifications. I notice you

(Testimony of M. C. Schaefer.)

were reading from 1068. Maybe I handed you the wrong one. Do you know, Mr. Schaefer, whether these specifications on 1062 and 1068 are identical? Do you know, Mr. Holman?

Mr. Holman: I think they are. We can agree on it. You asked him to read from 1068, and I wondered why.

Mr. Olson: I intended to have him read from 1062.

Mr. Holman: They're paged just a little different, Mr. Olson, so I just can't answer you without reading one against the other.

Mr. Olson: Well, I want to have them both in the record anyway, because if we can't stipulate to it we'll have to read them. The documents speak for themselves, and I intend to have Mr. Schaefer explain them.

Direct Examination

(Continued)

By Mr. Olson:

Q. Handing you, then, plaintiff's Exhibit 3, would you read that portion of those specifications which refer to and describe the excavation to be done in the performance of the contract? [163]

The Court: Is there any contention those are not substantially the same?

Mr. Holman: I think not.

The Court: Well, let's let the record show it, then. We don't want to waste any time reading it.

Mr. Hawkins: Where is that to be found?

Witness: On page 22.

(Testimony of M. C. Schaefer.)

The Court: Of plaintiff's Exhibit 3?

Mr. Olson: The bottom of page 22, and it is section 47, your Honor, on Exhibit 3.

The Court: All right.

Mr. Holman: That's different numbering, you see; that's why I couldn't answer you.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, referring now to this language that says "Except to the limitations described above, excavation for structures will in general be measured for payment to lateral dimensions one foot outside the foundation of the structure and to a slope of 1 to 1 for common excavation"; now, would you explain that to the Court, what kind of an excavation that describes?

A. Well, that describes an excavation that is made to the bottom of the floor area, the different floor elevations, and at such elevation having a lateral dimension of one foot outside of the concrete, and from there to the surface of the ground the excavation is made on a 1 to 1 slope, or 45 degrees.

Q. A 1 to 1 slope means what, you say?

A. That means one foot out to one foot vertical.

Mr. Hawkins: That's a 45 degree angle, is it not?

A. That's right.

The Court: Is that one foot on each side?

(Testimony of M. C. Schaefer.)

A. That is all around the structure. That means one foot out and then on a 1 to 1 slope to the surface.

Q. Now, one foot out in what part of the structure?

A. One foot out at the base of the structure.

Q. Then the next part of the specifications, it says "one quarter to one for rock formation." Was there any of that type of excavation on the job?

A. Well, there was some rock excavation. I don't know as to the—that there was any of it done on that basis. The rock excavation was performed vertical, the same as the rest of the excavation.

Q. Now, the one quarter to one for rock excavation would mean what, specifically?

A. One quarter to one would be one quarter out, one quarter of a foot, to one foot of height, or in elevation.

Q. Now, the next provision provided that where the character of material cut into is such that it can be trimmed to the required lines of the concrete structure without the [165] use of intervening forms, payment will be made only for the excavation within the neat lines of the structure. First, what is meant by the "neat line"?

A. The neat line is the outside line of the concrete.

Q. Were there any of that type of excavation?

A. No, there were not.

(Testimony of M. C. Schaefer.)

Mr. Hawkins: I didn't hear the answer.

(Whereupon, the reporter read the last previous answer.)

Q. There were no excavations, then, that did not require an outside form to the concrete structure?

A. That is right.

Q. Now, it says that the—refers to dimensions and lines as staked out or otherwise established by the contracting officer. Now, what did the Bureau of Reclamation do, if anything, with reference to the staking out?

A. Well, they gave the lines at the head walls, and they gave the grade elevation for the height of the structure.

Q. And how did they do that? How was it shown out there on the job, so that we know what we're working on?

A. There were stakes placed by the Bureau engineers with measurements noted on them as to the distance from a particular stake to the center of the structure in each direction, or to the center of the head wall, and so the matter of taking two lines, you would get the, have the [166] proper lines to work from for laying out your structure.

Q. In other words, there were stakes out there where the excavation was to be made?

A. That's right.

Q. And data that gave the elevations?

A. Yes.

(Testimony of M. C. Schaefer.)

Q. Now, referring to the next part "The bottom and side slope of common excavation upon or against which concrete is to be placed shall be finished accurately by hand to the dimensions shown on the drawings." What does that refer to?

A. Well, that more particularly refers to certain type of structures that were in some of the ditches.

Q. Well, would that or would it not, Mr. Schaefer, have any reference to plaintiff's Exhibit 12?

A. It would.

Q. And would you explain what plaintiff's Exhibit 12 is, and how it was used? What was its purpose in performance of this work?

A. This shows the plans of the structures. This with other print also shows the station, so that you locate the place where each of these structures were to be placed.

(Whereupon, map of laterals with structure numbers was marked Plaintiff's Exhibit No. 22 for identification.) [167]

Q. Showing you plaintiff's identification 22, Mr. Schaefer, I'll ask you to explain what it is.

A. That is the map of the laterals and with the numbers of the structures noted thereon.

Q. Does this map also give certain numbers known as stations?

A. That's right.

Q. Now, the structure numbers that appear on this map were placed on it, if I may ask a leading question, counsel, after the map was issued by the Bureau of Reclamation?

A. That is right.

(Testimony of M. C. Schaefer.)

Q. The station numbers, however, that appear on here were part of the Bureau's records?

A. That's right.

Mr. Holman: May I ask a question, just to help the situation?

Mr. Olson: Yes.

Mr. Holman: If you will refer to sheet 1 of the specifications, is this identification that you now hold intended to be an enlargement of that, with the stations added? Is that the purpose?

A. This here, if it is the same area as this, then this here is an enlargement.

Mr. Holman: Well, may I inquire, was this received from the government, or did you make this map up?

A. No, this here was received from the government. [168]

Direct Examination
(Continued)

By Mr. Olson:

Q. When you say "this here" you're referring to plaintiff's identification 22?

A. That's right.

Q. All right, now, Mr. Schaefer, can you explain to the Court how identification 22—well, first, I'll offer identification 22.

Mr. Holman: I object to it as not being sufficiently identified, for the reason that the stationing on there is not a government marking. That's

(Testimony of M. C. Schaefer.)

been put on not by this witness, but by someone else, is that correct?

Witness: No, the stations are marking by the government.

Mr. Holman: But the structures are put on by whom?

A. By Concrete Construction Company's superintendent on the job.

Mr. Holman: Who's that?

A. That is Pat Darcy.

Mr. Holman: I have no objection to it being admitted, subject to it being bound as to the stations.

Mr. Olson: Well, the stations are Bureau of Reclamation records, but the structure numbers are inserted by Mr. Darcy, and they're on there entirely for convenience of location, and I'm not offering it for the purpose of binding you to anything on that. I just merely want to [169] show that in order to perform this job how these records went together.

Mr. Hawkins: Your Honor, we object to the admission of that in evidence because there is no testimony that that map relates to any of the contracts or sub-contracts or specifications in evidence. If that is properly identified I don't see that it is material. That is in addition to counsel's objection.

Mr. Holman: Well, I would join in that, too. I thought the witness had answered me "Yes, it was this."

Mr. Hawkins: I understood him to say he didn't know.

(Testimony of M. C. Schaefer.)

Witness: If this covers the same area?

Mr. Holman: I object also. I misunderstood the answer.

Mr. Hawkins: We have certain contracts and certain specifications, and that is where we have to trace our liability.

The Court: It would have to be more specifically identified, then, if it is objected to.

Direct Examination

(Continued)

By Mr. Olson:

Q. Examine this and tell me whether or not it covers job 1062. If it doesn't, I don't want it in either.

Mr. Holman: If that's just what they call a "blow-up" of this, that's fine. [170]

The Court: He can't tell that, because he didn't prepare it. It is from the Bureau of Reclamation.

A. This here refers to 1062.

Q. Well, does it cover the area? A. Yes.

Q. And does it show the station?

A. It does.

Q. That refers to job 1062? A. It does.

The Court: Is all of the work under 1062 shown on that exhibit?

A. Yes.

The Court: What are the lateral numbers? Where do they come from?

Q. Would you explain to the Court, Mr. Schaefer, what these lateral numbers that appear on the specifications, what do they refer to?

(Testimony of M. C. Schaefer.)

A. They refer to the different laterals taking off of the main canal, and they are used for convenience in locating the structures on the job.

Q. Now, the purpose of the Bureau issuing this map in connection with this work is what? What does it show?

Mr. Hawkins: I object to that as purely hearsay.

The Court: The objection will be sustained to the form of the question. He wouldn't know what the [171] Bureau's purpose was. He can explain how the map is used.

Mr. Olson: Well, it's such a simple thing we're trying to show here, I don't see why counsel is objecting to it. Any objection to my asking a leading question?

Mr. Hawkins: My objection is that it is not tied in with the specifications whatever this may show. We don't know whether it covers any liability in this case.

The Court: He says now it is a map covering this particular project, 1062.

Mr. Hawkins: Going further, my point is that this witness does not know of his own knowledge that this accurately reflects the situation that exists with respect to 1062. It is merely a map prepared by someone else and given to him as a representation of 1062. Apparently that is as far as his testimony goes at this time. If he can just state that that is an enlargement of the drawing attached to the specifications, that's something else again. It

(Testimony of M. C. Schaefer.)

seems to me that it would be merely a matter of somebody taking a few minutes looking it over to see if that is true. If it is some other or different map, I think it is immaterial.

Mr. Holman: That is just the point I had, your Honor. If it is merely a "blow-up" for the purpose of this witness explaining something to the Court in trial, and it is not to be admitted, that is one thing. If it [172] is going to be admitted as a government document, then I want it authenticated before I can accept it without objecting.

Mr. Olson: Your Honor, it says right on it here that it is a United States Department of the Interior, Bureau of Reclamation, Yakima Project, Washington, Roza Division, Laterals 59.3 to 69.8 and sub-laterals, and diversion channels mile 38 to 49, which is the same as the specifications, and it is a location map. What I'm trying to show is that this is the map that told them where to go to make the excavations. That showed where it was. That's all I want to show about it.

The Court: Is it just an enlargement of the one Mr. Holman has?

Mr. Olson: It is to the best of my knowledge, your Honor. That's what it says it is, and that's what I've understood.

The Court: Would it be possible to compare those, Mr. Holman?

Mr. Holman: Yes. If I knew counsel's purpose, if counsel wants to put that up to have this witness explain some general characteristics, we have no

(Testimony of M. C. Schaefer.)

objection to it, whether he drew it, or counsel drew it, or anybody else, by way of illustration. If he's putting it in as an official document, I certainly object to it as not [173] sufficiently authenticated.

Mr. Olson: I'll state my purpose, your Honor. We have this exhibit 12, which is the structure layout, and which shows each structure to be installed, and also has a station number, so I'm offering 22, which is, as I understand it, if it isn't I'll withdraw it, an enlargement of the area map that is contained in the specifications, so that when one goes to this station, this 22, he can find a station on it, and then refer to the structural layout and see the type of the structure that's to be placed in that location. 22 shows where it is to be put, and Exhibit 12 shows what's to go there. 12 shows what's put there, and 22 shows where it goes, and the only purpose of it is so that your Honor will have that information and know whether one structure is in relation to the other. As I say, if it develops that's not an enlargement of what is in the specifications, I'll withdraw it. I so understand it to be.

Mr. Holman: I would just like to do 'most anything to expedite counsel's trial. If he merely wants to have this witness testify on that, without giving it the authenticity of an official document, then it is only a blow-up for that purpose, and I have no objection to that exhibit being introduced

(Testimony of M. C. Schaefer.)

in evidence, but when you try to tie the Bureau to it, I do object, without [174] authentication.

The Court: I think his purpose is to accurately place by use of this map the various stations referred to in the specifications. It is to place and locate on this map, which is plaintiff's identification 22, place and locate on this map the various stations that are referred to in the specifications, so it seems to me it would be going beyond simply illustrating the testimony of the witness, because he wants to place them on the ground so far as this map is concerned by reference to station numbers.

Mr. Holman: That may or may not become important in this case. If it does, then somebody should authenticate it by virtue of status and so forth. Another thing that disconcerts me is that the map has a statement behind here that I don't understand at all. Counsel, what are these hanging on the line?

Mr. Olson: I don't know, Mr. Holman.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, then, referring to plaintiff's Exhibit 12, would you explain to the Court what that exhibit is?

Mr. Holman: I think that's already been covered, your Honor, by the witness' answer; structure lay-out.

(Testimony of M. C. Schaefer.)

The Court: I don't know that he has. I'll permit him to answer. [175]

A. This is the prints by which the carpenters built the forms, built and set the forms. It is a structural lay-out.

The Court: That's 12, is it?

Q. Yes. You say that is the plans from which the carpenters built the structures?

A. That's right.

Q. What else could it be used for, if anything? What I'm trying to get at, Mr. Schaefer, how did these people digging these holes, how did they know what kind of a hole to dig, whether it went out this way or that way, how did they know that?

A. The parties doing the excavating also used them in the excavating.

Q. Used what? A. These prints.

Q. When you say "these prints" what do you refer to? A. The structural lay-out.

Q. Then, just for example, taking any one of those structures shown in the lay-out there, how would one determine, either the excavators making the excavation or the contractors building the forms, how would they know where on the project it was to be placed, the hole dug or the structure placed; how would they know that?

A. By use of the map showing the stations.

Q. And by map, what map do you mean?

A. I mean the map of the laterals attached to the specifications.

(Testimony of M. C. Schaefer.)

Q. Is that the map that is called the "location map" that appears immediately following page 36 on plaintiff's Exhibit 3? A. That is correct.

Mr. Holman: That is labeled drawing number 1, counsel. Each drawing is numbered.

Q. That's right. Now, what numbers or what name is there, then, that connects the structural lay-out and this drawing number 1, that identifies the location of the structure on the ground?

A. The station number.

Q. The station number. In other words, does each location have a station, a numbered station, on the location map, drawing 1? A. Yes.

Q. And on the plans and specifications, or the structural lay-out, does each one of those structures have a location number? A. They have.

Mr. Olson: Does your Honor wish to look at this map and follow it as we go along?

The Court: Yes, if you have another one there.

Mr. Olson: Well, I've got one that I'm satisfied with, if no one else is.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, with reference to specifications 1068, Mr. Schaefer, without going into the same detail, is the same set-up on station numbers and plans and specifications true in that job as on 1062?

A. That is the same type of prints.

(Testimony of M. C. Schaefer.)

Q. Same general type?

A. Same general type, yes.

Q. With a location map of the station numbers?

A. Yes.

Q. Now, how did you first get in touch with Mr. Macri for this job, or he in touch with you?

A. We received a letter from Macri Company superintendent.

Q. And pursuant to receiving that letter did you ultimately enter into this, or go over the job and make this contract? A. Yes.

Q. Sub-contract 1062. Now, when did you take over the work covered by your sub-contract on 1062?

A. We signed the contract on the 15th day of March, 1944. We assumed the payroll of two or three men then working on the job, and assumed that payroll as of March 13, 1944.

Q. So that when you signed the sub-contract what was the [178] situation with reference to job performance on 1062?

A. They had started to build structure form panels.

Q. Who had? A. Macri Company.

Q. Macri Company; they had already started building structural forms? A. That's right.

Q. Then you say you took over the payroll as of two days previous? A. That's right.

Q. And what did you do then, if anything, Mr. Schaefer?

A. Well, we went ahead building form panels. We had figured that on the basis of Mr. Macri's

(Testimony of M. C. Schaefer.)

superintendent, that we would be pouring concrete in two to three weeks. That letter, I believe, was received on March 2. However, we didn't get to pouring any concrete until the last day of July, 1944.

Q. Were there any excavations made on March 13, '44, when you took this job over?

A. No, there weren't.

Q. Who was the foreman that you started out on the job?

A. Fred Waltie.

Q. Spelled W-a-l-t-i-e?

A. Correct.

Q. Now, was Mr. Macri then doing any excavating? [179]

Mr. Holman: Just a minute, your Honor. I would suggest that counsel doesn't lead. That question hardly offends, but at least let the witness testify instead of answering yes and no. I'll not object to that question.

Q. Was Mr. Macri then excavating or performing excavations when you took over your performance on March 15, I believe you said it was?

Mr. Holman: I object to that question as leading, your Honor.

The Court: Well, he's already testified that there were no excavations at that time. I'll overrule the objection.

Q. Well, what was Mr. Macri doing at that time, Mr. Schaefer, that is, with reference to this job?

A. I'm not certain that they were doing clearing. I'm quite sure that they were not doing any excavating whatever on the job at that time.

(Testimony of M. C. Schaefer.)

Q. When did they start excavating?

Mr. Holman: I object as not the best evidence, your Honor. The government record is the best evidence.

The Court: Overruled.

Mr. Holman: Exception.

Q. If you know.

A. I'm not positive. I think I'd have to look at the record on that. [180]

Q. Well, have you got a record there that you have made, or Concrete Construction Company record from which you can tell that?

A. Yes, I believe I have it here.

Mr. Holman: May I inquire, counsel, whether this witness made the record, or is it his job record?

Q. Is this a record you made, Mr. Schaefer, or is it your foreman's?

A. This is a record made by the foreman.

Q. That's Mr. Waltie? A. That is right.

Q. And the record you referred to is one your foreman made, at any rate?

A. This here was copied from the daily reports.

Q. All right. Now, when were you on the job next after you took over the operations, Mr. Schaefer?

A. I believe we went over to the job on the day following the signing of the contract.

Q. All right, and on that day what did you see as far as excavations was concerned?

A. No excavations.

(Testimony of M. C. Schaefer.)

Q. All right, when were you on the job next? You can refer to any notations which you've made, if any, Mr. Schaefer, to ascertain these dates.

A. As to the exact date I do not know whether our daily [181] reports there would indicate it.

Q. Pardon?

A. I do not know whether our daily reports would indicate what the next day was at which I was over on the job. I was over at the job a number of times right successive there.

Q. Well, when did you first see some excavations there, do you know that?

A. The first excavations?

Q. That you saw yourself.

A. I believe that was April 18.

Q. Well, now, would you describe—who was with you at that time, do you know, Mr. Schaefer?

A. There was the men on the job. There wasn't anyone particularly with me at the time.

Q. And can you describe the excavations that you saw that day?

A. The excavations were made vertical. There was no one to one slope. They were made tight.

Q. Were there any structures in place on this April 18 date?

A. Yes, we had set a few structures at that time, I believe.

Mr. Hawkins: I can't hear the witness.

The Court: Speak up a little louder.

A. I believe we had a couple of structures in place at that time. [182]

(Testimony of M. C. Schaefer.)

Q. Explain what you mean by the excavations being "tight."

A. Well, they were just too tight to work in, to build forms.

Q. What do you mean by tight?

A. Well, anything less than, we'll say, a foot out, is really tight. All of the excavations there were tight, being that they weren't excavated over a foot out, and vertical, whereas they were called out for being excavated out a foot and on a 1 to 1 slope.

Mr. Holman: I move that last be stricken as a conclusion of the witness, your Honor. The specifications control.

The Court: Well, I'll let it stand for what it is worth. I know what the specifications are.

Mr. Holman: Exception, your Honor.

The Court: Yes, exception allowed.

Direct Examination
(Continued)

By Mr. Olson:

Q. All right, when were you next on the job, Mr. Schaefer?

A. I believe I'll wish to refer to the daily reports.

Q. You want a record that you don't have up there? Just tell Pat what you want.

A. Pat, I believe there is a small diary——

The Court: Well, we'll recess for ten minutes, and perhaps you can find what you want by then.

(Short recess.)

(All parties present as before, and the trial was resumed.) [183]

Mr. Holman: Your Honor, and counsel, I wonder if I could interpose a minute. I have a telegram from Mr. R. G. Newell of the Bureau of Reclamation at Boise, Idaho, that indicates it will be necessary to take the deposition of Mr. H. T. Nelson, the engineer in charge, and I would like at this time to make application that his deposition be taken and have a commission issued so [183A] that it can be made available here to your Honor in connection with the trial.

The Court: Where is he, at Denver?

Mr. Holman: No, at Boise, Idaho, your Honor. Off the record—I don't object to it being on the record, I understood that one of the men here died Saturday or Sunday, and there is to be a funeral some time here soon, one of the Bureau men, and that may have made a difference in the plans, I don't know.

The Court: Well, how do you propose to take a deposition now, Mr. Holman; by written interrogatories?

Mr. Holman: I would say oral interrogatories, your Honor.

The Court: How can that be done, and continue the trial here? I assume it is the same counsel.

Mr. Holman: Well, I had in mind that it could be taken at Boise, Idaho, possibly on Saturday.

The Court: Well, is there any objection to taking a deposition at this stage of the proceedings?

Mr. Olson: Very, very much. Mr. Nelson has been over in Boise, Idaho, for a long time, and counsel either knew it or could have ascertained that that is where Mr. Nelson resided. I have talked with Mr. Nelson myself and I also asked him if he'd come here, and he told me he wouldn't. As a matter of fact, he was in town here a few [184] days ago. It is a fact that Mr. Ball, the engineer here, passed away, and I wouldn't be surprised but what Mr. Nelson came here for the funeral, prior to this trial being over. If he is, of course counsel can subpoena him, but we certainly object to any continuance to take the deposition of Mr. Nelson at this time. There's no showing made whatever of any excuse for not having taken it sooner.

Mr. Holman: I expected Mr. Nelson to be here, your Honor. I talked with him.

The Court: I don't believe I would be justified in postponing this trial, or continuing it.

Mr. Holman: I don't ask that. I would ask during the progress of the trial to have the time to take the deposition, either on written or oral interrogatories. I am just faced with it now.

Mr. Hawkins: I understand the plaintiff has 20 witnesses; the defendant has a good many; at the rate we're going now I understand it will go over until next week.

The Court: Well, for one thing, I don't propose that this trial is going to move at the rate it is

moving today. It is going to move faster than that if I have anything to do with it, and I think I do. I've set aside one day next week for this trial, but I have another [185] following it with a large number of witnesses, some of them from Delaware. If this taking of a deposition meant considerable delay it would have to go over a month or so, and I don't think that is justified.

Mr. Holman: I wouldn't think so, your Honor. I would think that either on written interrogatories or oral deposition it would co-ordinate right with the trial.

The Court: It isn't necessary to get any commission to take the deposition, if it is in the United States here.

Mr. Holman: I understood that, your Honor. I just felt obligated to tell your Honor this when the telegram came to me, and to notify counsel that we want that done.

Mr. Olson: We're objecting to it, if the Court please. Mr. Nelson doesn't know anything all the other—as a matter of fact, he's the one to whom these field inspectors reported. The field inspectors are practically all available in the Bureau of Reclamation.

The Court: Had Mr. Nelson told you he was coming here?

Mr. Holman: Subject to permission of his superior, who was Mr. Newell, and Mr. Newell has by

this telegram told me he won't be here. I don't know but whether or not this death may have caused it.

The Court: This isn't a very timely application for his deposition, it seems to me, a case pending as long [186] as this one, coming in with an 11th hour request necessarily must disrupt this trial. I don't see how you can get a deposition or settle interrogatories and take the deposition and get it back by the time the trial closes, or should close, Monday or some time early next week.

Mr. Holman: I was with Mr. Nelson Saturday in Boise and at that time he planned to come.

The Court: At that time he planned to come here?

Mr. Holman: Subject to Mr. Newell's approval, and Mr. Newell has not approved.

The Court: What would he testify to if he got here?

Mr. Holman: Your Honor, he will testify to—and counsel may be willing to admit these things, I don't know—he would give complete qualifications; he would give authentication of the various maps and drawings——

The Court: What maps and drawings do you refer to?

Mr. Holman: With reference to the exhibits in evidence, as the specifications.

The Court: Well, they're already in evidence, aren't they? Do you require further authentication, if they're in evidence?

Mr. Holman: No, sir; I mean with reference to the job itself. I was just reading down over the notes that I had of what Mr. Nelson would cover, your Honor. He would explain with reference to the practical applications in [187] the Bureau office of items 5, and 8, and I probably can get that from even Mr. Pease, I presume. He was the actual engineer in charge, and had considerable inspection of this work, and I probably can cover that by other engineers, so it may be I'm not as badly hurt as I thought, but I would respectfully ask that my application for the taking of the deposition, instead of being denied at this time, if your Honor would allow it to stand, and when the case is further along. If it becomes evident that it is proper or necessary, why then I can renew it. I have no idea of delay at all, but it just came to me.

The Court: You may renew it, of course.

Mr. Holman: One other thing, your Honor. I have not had the telegram from the attorney for the Seattle First National Bank, but I presume it will be in some time during the day. Mr. Hawkins is arranging for Mr. Goerig to be here with a copy of the papers Mr. Macri was supposed to present.

The Court: All right, proceed. [188]

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, just relate briefly to the Court what trips you made to the job site and what inspections, if any, you made of the excavations on the job under 1062. •

A. All right; that was on April 18 that I checked up on the excavation, and at that time they had a few of the structure forms set, and the excavation was vertical, and it was tight; our own crew did the majority of the fine grading, and had to excavate out to make room for our forms. The next date that I have record of being out on the job, we had an appointment with Mr. Macri on April 28. We waited on the job all day for Mr. Macri, and had conversation with Mr. Staples at the time——

Mr. Holman: I move that answer be stricken as not responsive, your Honor. The question is when he was on the job.

The Court: The last part is not responsive. It will be stricken.

Q. Were you at the job site on April 28, 1944?

A. No; that is, yes, I was on the job site, but I didn't go out in the field. I waited on the job for Macri to appear at the office.

(Testimony of M. C. Schaefer.)

Q. Just state what occurred on that day. [189]

A. On the 28th we, William E. Schaefer and myself, had an appointment with Sam Macri at 10 o'clock at the job office. Macri did not show up. Mr. Staples, Macri and Company superintendent, came in from the field in the afternoon. I asked him to locate Macri. Staples called Seattle and did not reach Macri.

Q. Who is Mr. Staples?

A. Staples was then Macri Company superintendent. Did not reach Macri at Seattle——

Mr. Holman: What is that you're reading?

A. That is the notes made at the time of the meeting out at the site.

Q. Who made the notes? A. I did.

Q. Without reading them, Mr. Schaefer, you can refer to them to refresh your recollection, just tell us what took place on the 28th. Did you have a meeting with Mr. Macri on the 28th of April?

A. No, Macri didn't appear on the 28th. We stayed over until the 29th.

Q. Now, on the 28th, whereabouts were you on the site? You said you weren't out at the excavations. Where were you?

A. No, we stayed at the office.

Q. And is that where you made up your forms?

A. That's right. [190]

Q. Did you observe anything there at the yard that day?

A. On the 28th of April, yes. They were building forms in the yard.

(Testimony of M. C. Schaefer.)

Q. Did you have any forms already finished? Go ahead and tell the Court, Matt, what you saw with reference to forms.

A. All right; we had form panels built, and the carpenters were building additional form panels. The lumber that we were then using was about the best that had arrived at the job during the course of the whole construction.

Q. How about the lumber that you had received previous to that time; was it all right?

A. That was lumber that we were using, that had been delivered previous.

Q. All right.

A. The lumber was wet. At that time we didn't have lumber that was full of knot-holes or faults of that kind, but it was so wet, which later on we had to do a lot of repair work on.

Q. Now, explain to the Court, so that the Court will know, Mr. Schaefer, whether the fact that the lumber was wet interfered any with the job.

A. It did.

Q. And in what respect?

A. The shrinkage in the form lumber caused the forms to open [191] up to the extent where you could shove a pencil through between the laps of the shiplap, requiring that we had to cut strips to fill some of the gaps, and to take off the sheeting and re-sheet these panels. We did that both to the forms in the yard that hadn't gone out to the job, and we had to do it with some of the forms out at the site.

(Testimony of M. C. Schaefer.)

Q. Now, you say you did talk with Mr. Staples that day, on the 28th? A. Yes.

Q. And that's Mr. Macri's foreman?

A. That's Mr. Macri's superintendent.

Q. What conversation, if any, did you have with him that related to this job 1062?

A. Might I read that?

Q. I assume counsel doesn't want you reading your notes.

The Court: Use any memo you made at that time to refresh your memory. Don't just read from it. If you need to, look at it to refresh your memory, then you can tell us, if that does refresh your memory, what the conversation or the transaction was.

A. Staples called, I requested Staples to get in touch with Mr. Macri, and that I wanted that Macri be there before noon the next day, otherwise we were going to gather up our equipment and pull off the job.

Q. Did you tell him why? [192]

A. Because of their excavations not being made as specified, and because of the lumber situation, the general condition of the job. It was just not progressed. The fine grading wasn't ahead, there was no one in charge to do proper fine grading, our foreman on the job had to help their men lay out and check their fine grading.

Q. Had you seen your men——

Mr. Holman: Just one minute. May it please the Court, for the purpose of the record, this would

(Testimony of M. C. Schaefer.)

follow through, your Honor, I move that the witness' last answer—I would like to ask the witness one question in support of my motion, if I may.

Mr. Olson: Go ahead, counsel.

Mr. Holman: Did you send written notice at that time or within five days thereafter to Macri?

Witness: I did not.

Mr. Holman: Now, then, your Honor, in view of the witness' testimony, I move that the answer be stricken, for the reason of the following provisions in the sub-contract 1062, Exhibit 5, and also the same paragraph in Exhibit 6. Paragraph 5 reads as follows, upon which I base the motion——

The Court: Where are you reading?

Mr. Holman: Paragraph 5, under the heading of "Delays" on page 4, your Honor. [193]

The Court: The sub-contract?

Mr. Holman: Yes. Does your Honor have the printed form?

The Court: This is the printed form, yes.

Mr. Olson: It is 5, under Article III.

The Court: Oh, I see.

Mr. Holman: Under the heading of "Delays".

(Whereupon, Mr. Holman read paragraph 5, Article III, of plaintiff's Exhibit 5; and read paragraph 9 of Article I of plaintiff's Exhibit 5.)

Mr. Holman: In other words, it is our position, your Honor, that the contract provisions control,

(Testimony of M. C. Schaefer.)

and that notice would have to be given before this could become pertinent or relevant for any recovery by Schaefer.

Mr. Hawkins: The defendants Goerig and Philp join in the motion.

Mr. Olson: If your Honor please, what I'm attempting to show by this witness is the fact that he got Mr. Macri over here, first had an appointment to be here the 28th, he didn't come, we got him here the 29th, for the very purpose of taking him out and showing him item by item the very things he wasn't doing. I'll show also previous complaints made by the foreman, by our foreman. This was a meeting in the field in which they were pointing [194] out to him specifically the very things we complained of were wrong, and why. It is true that doesn't constitute a written notice, but your Honor, certainly a personal pointing out on the job is equivalent to a written notice. Now, the point that counsel is raising is also a matter of law that we'll have to go into at the end of the case. As I understand, counsel wants to make his objection and it is going to go to some other evidence, but it will be our position, your Honor, that by virtue of Mr. Macri's breach of this contract, that this contract became abrogated, and that we're not bound by it in any particular whatsoever.

The Court: I'll overrule the objection at this time.

(Whereupon, the reporter read the last complete question and answer.)

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Had there been any concrete poured yet, Mr. Schaefer? A. No, there hadn't.

Q. Then what did Mr. Staples do then, if anything?

A. Well, Mr. Staples then said "Don't do that, Matt; I believe Mr. Macri isn't going to interfere; I believe he's going to quit interfering with my program, telling me to lay off men, that I've got too many men on the job; and that I'm just going to go ahead with the men, and [195] we'll see that the excavating work is done according to specification, and you're not going to be delayed any further"; and I told him that that wasn't enough, that I wanted him to get in touch with him, and he says "Well, don't pull off the job, I'll get in touch with him" so then he called Yakima and talked to Mr. Macri. In other words, he fumbled around at the side of the studs looking for a telephone number, and I doubt——

Q. Never mind. Did you the next day meet with Mr. Macri? A. Yes.

Q. And whereabouts?

A. I believe we met with Mr. Macri at the office, and drove out to the field.

Q. You say at the office; you mean on the job site? A. The job office.

Q. All right; now, this is what date?

A. This is then on the 29th.

(Testimony of M. C. Schaefer.)

Q. Of what? A. Of April.

Q. What year? A. 1944.

Q. April 29, 1944. Now, who was there?

A. There was William E. Schaefer, myself, Fred Waltie, our superintendent, George Schuler, a form setter, Mr. Macri, and Mr. Staples came in to the conversation later, as I [196] remember.

Q. All right; now, just tell the Court, Matt, what happened on that day, what was said, and what you did, and what you saw.

A. We drove out to the field and stopped at structure number 18. At that structure there was Fred Waltie, our superintendent, and George Schuler, a form setter, were excavating. It was at the head of the siphon or piece of pipe line. The excavation there had been dug not to the bottom of any part of the floor of that structure, but at the top elevation of that floor, and instead of being on an incline it was excavated level. The head wall of that structure was about—had about a foot short—that is, the excavation for the head wall was a foot short of the concrete wall itself, let alone have an excavation out for any forms at the end of that particular wall.

Q. Now, for the record, can you explain briefly what you meant by the head wall?

A. That is the main wall across the ditch.

Q. Would that be at the entrance of the structure?

A. At the entrance to the pipe. I then had Schuler and Waltie stop excavating, and I asked Waltie to come with us to check these excavations.

(Testimony of M. C. Schaefer.)

Q. Schuler and Waltie were whose employees?

A. Concrete Construction Company.

Q. And they were excavating, you say?

A. That's right.

Q. Was that a part of your contract?

A. That was not.

Q. What did you do then?

A. Then Waltie sent Schuler to the yard to work, and then Fred Waltie came with the rest of us, that is, brother Bill, Macri, and myself, to check excavations.

Q. I don't think we've brought out yet what capacity your brother W. E. Schaefer held in this job.

A. He is the general superintendent.

Q. He is the general superintendent of the entire work?

A. That is over all our operations.

Q. All right; then what did you do after you picked up Mr. Waltie?

A. Waltie then came with us, and we went out to check the excavations. We checked approximately six or seven holes, and they were all off; they were all dug with vertical banks, and some that were not dug wide enough for the neat concrete, and at no place in these structures with the exception of the lead-in, or at the pipe, where the trenches were dug for the pipe laying, or at the open ditch section, was there a foot, or any more than a foot, of clearance. Much of the structures were less than [198] enough to accommodate the neat concrete.

(Testimony of M. C. Schaefer.)

Q. What do you mean by that, Matt, they were "less than enough to accommodate the neat concrete"?

A. If a person was to have built the concrete structure somewhere else, and just deposited it in this hole, he couldn't have got them in, because the excavation was not wide enough to fit that structure.

Q. How about the fine grading on those structures?

A. The fine grading was all off. There were some of the vertical banks that had been dug too wide, and some where the dirt bank hadn't been dug back far enough.

Q. You say the dirt bank; what do you refer to there?

A. That is at the difference between two structure elevations or two structures in the same hole. There may be one structure that has a 7 foot section, and the other section perhaps 4 feet or 2½ feet, and at the joining wall between these two structures there is a neat cut where the concrete flows against or lays up against the dirt bank.

Q. That's not the outside bank, then, that is supposed to be on the slope, that you're talking about? A. No.

Q. Now, what else did you notice, if anything, about these excavations?

A. Macri then said "Well, we're just getting started; you've got to expect some of this; you're supposed to do two or [199] three tenths of the excavation anyway".

(Testimony of M. C. Schaefer.)

Mr. Holman: Move it be stricken as not responsive.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: The answer wasn't responsive. It will be stricken.

Direct Examination
(Continued)

By Mr. Olson:

Q. Were there any of the excavation, Mr. Schaefer, that had structures in them, that you saw this day, the 29th day of April, 1944?

A. Yes, that's where we had the forms.

Q. Pardon?

A. Where we had the forms set, yes.

Q. Now, would you describe what the situation was as you observed it there, that is, excavations with the forms in, what clearance, if any, was there between the structure and the bank?

A. There was very little; there was very little clearance; in the majority it was clearance that our own men provided in order to get the forms; even to set the forms.

Q. And was there a slope or not, to the bank?

A. There was no slope.

Q. What was said, now, if anything, between Macri and yourself, or Macri and the other men there? [200]

(Testimony of M. C. Schaefer.)

A. Macri told me that we were to do that; they were just getting started, and that we were to do two or three tenths of the excavating ourselves, and I told him that we didn't have a thing to do with it, that that was up to him. Macri said "All right, we'll get the excavating right from now on", and turning to Staples, said "You get the men in here and get this little grading done"; and then looking at me, he asked me that we should go ahead with the excavating, and he'll pay for it——

Mr. Hawkins: Your Honor, the witness is reading from notes he's evidently prepared for this testimony; I don't think that's right.

The Court: You should refresh your memory from that, and then testify.

Mr. Hawkins: He's worked up this story.

Witness (Continuing): I said "Now just a minute, you know better than that; you do the excavating, according to the plans and specifications, and that it was for an excavation out one foot and on a 1 to 1 slope".

Q. Did you have any other conversation with him?

A. And I asked him to have sufficient men and equipment in there to get going so we wouldn't be stymied like we were at that time. I told him of his previous promises of having additional equipment on the job, and of having more men on the job, and that he would have his excavation [201] dug according to specification, that he was going to have ample lumber, better lumber, and have it

(Testimony of M. C. Schaefer.)

there in time and so that we would be able to flow with our work and pour not less than twenty yards of concrete per day, that was the average that we wanted to arrive at, and he had promised to so operate his work that we would be off of the job, with both job number 1, that's 1062, and 1068 by September 15.

Q. Of what year?

A. Of 1944, and he said "Well, what are you hollering about; you'll be out of here by September 15, we're all gonna be out of here by September 15; there isn't gonna be anybody lose any money on our job; we're just getting started here; we'll get this thing straightened out and get going"; and then I asked him when he was going to get going, and well, he says "I'll pay you for the expense of excavating that you do here".

Mr. Hawkins: Just a moment. I object to that and move to strike it. In the first place, it is not responsive to any question asked, and in the second place, there is a written contract in this case, and all of this testimony is purely parol for the purpose of modifying or changing that written contract, and I object to its introduction. I move it be stricken.

Mr. Holman: I join. [202]

The Court: I think it is responsive in a general way. He's been asking about these conversations. As to this modification what do you say?

Mr. Olson: Your Honor, the rule against modification relates only to oral statements made prior to the written contract. There is no rule against

(Testimony of M. C. Schaefer.)

having a written contract changed by a valid oral agreement made afterward, based on a consideration.

Mr. Hawkins: He hasn't testified to any oral agreement.

Mr. Olson: He just started to, until you objected.

Mr. Hawkins: He testified he promised to do this and that, and the only thing this man is giving in consideration for that is that he will perform the contract that is already signed.

The Court: Well, I'll overrule the objection; you may proceed.

Direct Examination

(Continued)

By Mr. Olson:

Q. All right, proceed with the conversation.

A. I said "That isn't all you're going to pay for; who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, such type of holes, instead of to specification, of stripping the forms out of these holes, doing the necessary excavating [203] to get them out, wrecking them, having to haul them all back to the yard for repair, instead of to structures ahead"? Our figure was based on doing just that, taking our structure panels to the job, building our forms, pouring the concrete, then stripping the forms, without but very little damage, moving them on to

(Testimony of M. C. Schaefer.)

structures ahead, instead of hauling them all the way back to the yard.

Q. Could that have been done if you had had the excavation out a foot and 1 to 1 slope?

A. That is right.

Q. And could you take your panels and forms out without damaging them in view of the excavations that were made?

A. No; some of the forms the boys hooked a truck to, to pull them out of the hole, and they were really wrecked.

Q. Now, what else was said, if anything, between you and Mr. Macri on this date of the 29th?

A. Macri said "I'll pay you for all extras". He says "All right, I'll pay you for all the extras, just get going". I said "You're going to pay for all the additional cost and expense; you're paying for all of the extras". He says "Well, that's all right, I told you that before".

Mr. Hawkins: Again we object to that, and move it be stricken.

Mr. Holman: Not responsive, your Honor. [204]

The Court: I'll overrule the objection.

Witness (Continuing): And so I said "All right, you've stated that you'll pay for all additional cost and expense, you're going to pay for all the extras, you're going to have the necessary men and equipment in here, you're gonna provide lumber sufficient and on time, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day,

(Testimony of M. C. Schaefer.)

and we're never gonna be stymied like this again". He said "Well, that's it, that's all right".

Q. Is that the substance, then, of what took place that day? A. That's it, yes.

Q. Now then, how did the work—pardon me.

A. Excuse me; back at the office later I had further conversation with George Staples.

Q. What was that conversation?

Mr. Holman: Just a minute: I object to the witness just reading off of this, your Honor; that's all he's doing.

The Court: He hasn't been reading, he just turned to refer to it again. I think he can refer to his own memoranda.

Mr. Holman: If it is made at the time, your Honor. If it is a trial memo I submit he hasn't a right to. [205]

The Court: He testified, as I understand it, that he made this at the time of the transaction.

Witness: This here was typed off of notes that were made that day.

Mr. Olson: That's what I understand it is, the notes made that day.

Mr. Holman: If he needs to refresh his memory from the notes he made that day, I submit it is proper, but certainly not to read from a trial brief.

Mr. Olson: I don't have any trial brief, counsel. I've got one, but he isn't reading it.

Witness: Then I'll read off of this.

The Court: No, just refresh your memory from it, if you need to, and then testify as to what happened.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. All we're asking, Matt, is to give the substance of this conversation. You don't have to give it verbatim, word for word, but the substance of it.

A. Back at the yard later I asked Staples "Now, what are these promises gonna amount to"? because we had had so many promises previous to these meetings, and Staples said——

Mr. Holman: I move that be stricken, your Honor.

The Court: Well, it's a conversation, as I understand it, with the defendant Macri's foreman. I'll overrule [206] the objection; deny the motion to strike.

Witness: Staples said "Now, that's it; out in the field Macri told me to go ahead and do the excavating and get things on the button, and then a little later he told me to keep going as I was" and he says "Matt, I'm getting tired of this; Macri is paying my salary, but this buck-passing isn't a part of my agreement".

Mr. Holman: Just a minute, your Honor. I object to that, and move it be stricken as not binding on Macri in his absence. I thought he was going to testify as to Macri's instructions, but now we're having a conversation between Mr. Schaefer and Mr. Staples pertaining to their own views.

(Testimony of M. C. Schaefer.)

The Court: Well, I think that insofar as the conversation relates to Staples relating to this witness what Mr. Macri had said at some other place should be stricken and disregarded. I think the foreman would have power to bind Mr. Macri as to something about the job, and if the conversation pertained directly to the job it is admissible, but I don't believe he should relate what Macri said to him. It would be hearsay.

Mr. Olson: It goes to what Macri's instructions were. Out in the field he told Schaefer he's going to do the excavation. After they get a little apart he says——

Mr. Holman: Mr. Staples is right here, your [207] Honor.

The Court: The way to prove that is by Mr. Staples. I will grant the motion as to that portion of it relating what Mr. Macri said to Staples.

Direct Examination
(Continued)

By Mr. Olson:

Q. All right, Mr. Schaefer, what was the progress on the job, or what was the performance, from that time on?

A. Well, I wonder whether I can go ahead with what Staples——

Q. You can testify to a conversation with Mr. Staples as long as you aren't relating in that conversation what Mr. Staples said that Mr. Macri said to him, as I understand it.

(Testimony of M. C. Schaefer.)

The Court: Yes.

A. All right, then I still say this about it. Staples said "I knew yesterday where to locate Macri——

Mr. Hawkins: I object to that, your Honor.

Mr. Olson: That's all right; part of the delay. Here's Mr. Macri's foreman——

Mr. Hawkins: Well, let's have Mr. Macri's foreman testify, then. This witness is testifying to something that is another situation might be insubordination.

Mr. Olson: Here is Mr. Macri's own foreman, in charge of this job. We've got a right to say we had a meeting here, and he knew where he was, but he didn't locate him, and held it up for another day. [208]

The Court: I'll sustain the objection to that. I think it is going too far afield.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, go ahead then and tell what performance, what was the nature of the performance by Macri and Company of its excavation work and furnishing of lumber after this April 29 meeting.

Mr. Holman: Your Honor, for the purpose of the record I would like to again interpose the objection previously made, and move that testimony

(Testimony of M. C. Schaefer.)

be stricken as contrary to the provisions of the sub-contract, which I have previously indicated to the Court, namely Article III, subdivision 5, and Article I, subdivision 9, which I have read to your Honor from Plaintiff's Exhibit 5.

The Court: Overruled.

Q. Do you have the question in mind?

A. No, I don't have.

(Whereupon, the reporter read the last previous question.)

A. Well, at this April 29 meeting I asked Mr. Macri what was going to happen a week from then, what we were going to be working on, and his progress or his method of excavating was no different from that time on; there wasn't any improvement in his operation.

Q. Were the banks excavated to a 1 to 1 slope after that? [209]

A. They were not.

Q. How were they excavated?

A. Vertical.

Q. And what was the situation as to clearance around the structure?

A. It was the same as had been previous, on all previous excavation. There was no clearance.

Q. And what was the situation with reference to fine grading?

A. The fine grading was in the same terrible condition.

(Testimony of M. C. Schaefer.)

Q. Do you know, Mr. Schaefer, when it was, if ever, that the Macri Company had any excavations completed and ready for installation of structures?

A. I don't quite get your question on that.

Q. Well, up until this April 29, as I understand you, there had still been no concrete poured.

A. That is right.

Q. Now, when was it you got down to the place where you could start pouring some concrete?

A. That was the last day of July.

Q. And give us the year each time, Matt, so it gets in the record.

A. Well, I wanted to point out a few more dates.

Q. The last day of July, what year?

A. 1944.

Q. All right, just go ahead and tell about it.

A. Let's see, I wanted to follow through on the different meetings that we had on the job; is that all right?

Q. Go ahead.

Mr. Holman: Your Honor, I ask that the witness be required to answer questions, instead of volunteering statements here.

The Court: He will answer questions. You answer the questions your counsel asks here, and if you feel it is necessary to refer to your notes to refresh your memory, you can do so, but it isn't permissible to read from a prepared memorandum.

Q. Go ahead, Mr. Schaefer, and relate what meetings you had on the job from time to time after

(Testimony of M. C. Schaefer.)

this April 29 meeting, what you saw and what was said and who was there.

A. On May 2, 1944, I again had an appointment with Sam Macri at the job, and he didn't show up.

Mr. Holman: I move that be stricken, your Honor. He's asked to say what he saw on the job. That isn't responsive.

The Court: Well, I'll let it stand. Go ahead.

A. We then checked the holes, the excavations, again, and they were still in the same—there was still the same situation.

Mr. Hawkins: What date was this?

A. That was on May 2. [211]

Q. Were there on that day, Mr. Schaefer, any excavations that were completed so that you could come out there and put your structural forms in place without doing any excavating?

A. No.

Q. Or fine grading? A. No.

Q. There were none ready?

A. There had been none on May 3. There was no work, no holes ready, and no lumber.

Q. Now, what was the situation on the lumber on May 3?

A. On May 3 there wasn't any lumber.

Q. Whereabouts was that?

A. In the yard.

Q. What do you mean by no lumber there?

A. There wasn't any lumber for our carpenters to build panels or to use out in the field. There was just no lumber on the job.

(Testimony of M. C. Schaefer.)

Q. What would you have to do with your crew when there was no lumber on the job? What did you have to do with them? What would you do with them?

A. At that time I don't know whether we—well, we just scattered them over the job, either had them go out to help set, or tie steel, just sort of had to shift around. It was just a lot of kill time. [212]

Q. All right, now, after May 2, when was the next date that you had that you were out there?

A. On May 6 Fred Waltie and George Schuler came into Portland and asked me whether—

Mr. Holman: Just a minute. I object to it as hearsay.

The Court: Yes, that would be hearsay.

Q. If it is just a conversation amongst yourselves you can't tell it. The conversation will have to be with Mr. Macri or his foreman.

The Court: Well, it is about time for overnight adjournment here. I'd suggest that during the adjournment period the witness refresh his memory from the notes he has and be in a better position to testify than he was today, without reading the memorandum.

(Whereupon, the Court took a recess in this cause until Tuesday, February 25, 1947, at 10 a.m.)

Yakima, Washington, Tuesday, February 25, 1947

(All parties present as before and the trial was resumed.)

The Court: I think the record should be a little more clear as to Mr. Holman's request with reference to the witness Nelson, who is shown by telegram not to be available. I'm not just sure that I know what Mr. Holman has asked the Court to do here. There are two methods by which you can take a deposition. You can give notice to the opposite party to take an oral deposition, or serve written interrogatories. There is no provision for a commission to issue by the Court, and it seems to me that unless counsel stipulate to take a deposition next Saturday, the time obviously would be too short to take it either by the oral or the written method. The Court assumed your request was tantamount to a motion for continuance in this case, and I don't believe that such a motion is timely.

Mr. Holman: Your Honor, may I answer your Honor in the morning? I may be able to cover something by long distance tonight. I don't want to do anything that is not necessary.

The Court: I just wanted to be sure that the record is clear here. I think there should be some showing how far it is from here to Boise. The record should show how far it is, that it isn't around the corner. How far is it to Boise?

Mr. Olson: I'll give it to you exactly, your Honor. 425 miles, and it is out of this district.

Mr. Holman: I know it is beyond—that's approximately right—it is beyond a subpoena. [214]

Mr. Ivy: If your Honor please, I would like to move at this time that exhibits 10 and 11 be admitted. I was absent after lunch.

The Court: Those are the applications for bonds. Is there any objection? They will be admitted.

(Whereupon, Defendant Casualty Company's Exhibit No. 10 for identification was admitted in evidence.

(Whereupon, Defendant Casualty Company's Exhibit No. 11 for identification was admitted in evidence.)

The Court: Well, that admits all of them from 1 to 12 inclusive. This case will be resumed at 10 o'clock in the morning.

(Whereupon, the Court took a recess in this cause until Tuesday, February 25, 1947, at 10 o'clock a.m.)

Yakima, Washington, Tuesday, February 25, 1947
10 o'Clock A.M.

(All parties present as before and the trial was resumed.)

The Court: Did you have something before we start, Mr. Hawkins?

Mr. Hawkins: No, I just want to bring your Honor up to date on the demands we made on

Maeri to produce certain documents. The claim against the government is [215] in my office being copied again. I'll have that later, and we received word from Mr. Henry yesterday that the bank's only copy of the original of the assignment had been misplaced and nobody was able to locate it. I talked to him last night and explained that all we wanted was a copy with a letter from him that it was a true copy of the original. He said it would undoubtedly turn up and he would send us a copy.

Mr. Holman: He communicated with Mr. Hawkins instead of me, your Honor. I wonder if I may again with consent of counsel and with your Honor's permission call some witnesses out of turn? I have subpoenaed the government field men, merely in connection with their data on the instruments filed here, for this morning. I did that some time ago. I don't think it will take long, with your Honor's permission and counsel's; I just hate to have them sitting around. They are very busy.

The Court: Do you have any objection, Mr. Olson, to calling a government man, Bureau of Reclamation?

Mr. Holman: There are six of them, your Honor, but it will not take long.

Mr. Olson: I have no objection.

V. E. NUTLEY

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name and residence?

A. V. E. Nutley. I reside at Sunnyside, Washington.

Q. And you have an official position with the United States Bureau of Reclamation?

A. Yes.

Q. What is it? A. Field Engineer.

Mr. Holman: Counsel, may I assume you admit the qualifications of these various gentlemen unless you question them?

Mr. Olson: Yes.

Q. I will pass your qualifications, then, Mr. Nutley. Were you in charge of the field engineering for the lay-out of the portion of the Roza Project known as 1062, Schedule 1?

A. Part of them.

Q. Yes; and did you stake those structures out, or your crew, under your direction?

A. Crews under the direction of the resident engineers, who report to me, staked out the structures.

Q. And are you familiar, too, with specification 1068? Did you have similar work there, Mr. Nutley? A. Yes, sir.

(Testimony of V. E. Nutley.)

Q. Will you explain to the Court, please, how a structure [217] is staked by your engineering force for the purpose of guidance to carry on the work under the specifications?

A. Well, you have the forms over there; you can see what a structure is.

Q. Those haven't been introduced yet.

A. Oh, they haven't been introduced; you can't see them, then. The structures are——

Mr. Olson: I have no objection to having these structures marked for identification if it will assist in explaining the testimony of the witness.

Mr. Holman: Well, I prefer to try my own case, your Honor.

Witness: The structures are boxes or combinations of boxes, and one main wall of the structure was referenced out generally, with a stake on each side, that is a hub, a two-inch square hub, with a tack in it to make an absolute point. The hubs were set out between 10 feet and 25 feet, one on each side, depending on the slope of the ground and other things that were in the way near there. Often one of these hubs would also be referenced out so that when it was lost, which it often was, it could be replaced easily, and beside each hub is a guard stake on which is written the structure number, the elevation of the hub, and the distance from a given point on the wall, which was the wall or weir that was picked out [218] as the main point of the structure to reference out.

(Testimony of V. E. Nutley.)

Q. When you speak of the elevation, is that the elevation of the top of the floor of the structure?

A. The elevation mark on the guard stake which refers to the elevation of the hub is the elevation of the hub above sea level—and I guess that's all you asked me.

Q. Yes, sir; then the top of the floor of the structure when completed would be at that elevation, or at a different elevation?

A. No, the hubs were not marked—there was no attempt made to set the hubs at the elevation of the top of the wall; the structure drawings showed the elevation of the top of the wall, and the elevation of the hub was marked on the guard stake.

Q. Then this elevation stake is the one stake that is definitely fixed to engineering data in connection with the line, grade, and all that?

A. Well, it takes two.

Q. What is the other stake?

A. You have to have two, to get your line.

Q. But that type of stake?

A. Yes, that's right, for the elevation.

Q. And that is the way that both of these projects that I mentioned were staked?

A. Yes, sir, to the best of my knowledge and belief. [219]

Q. Well, you've seen the stakes, had you not?

A. I saw a good many of the structures.

Q. Yes; all right, thank you.

A. Probably 50 per cent of them; that's the way they were done.

(Testimony of V. E. Nutley.)

Q. That is the engineering practice of the Bureau? A. Of our organization, yes.

Q. Now, will you tell me whether or not after excavations had been made, the Bureau of Reclamation returns to measure the excavated quantities, measure in the field? Do they? A. No.

Q. How is that computed?

A. The excavated quantity is computed from an average elevation of the ground at the structure, and theoretical cut lines one foot out from the concrete and up on a one to one, in earth excavation, which most of it was on those two jobs. It is in rock, too.

Q. And rock was one quarter to one?

A. No, I think rock was one half to one.

Q. It's what is provided in the specifications?

A. Yes, it is what is provided in the specifications, whatever it is. I wouldn't remember exactly on that. You can look in the specifications and see.

The Court: One quarter to one, isn't it? [220]

A. Is it a quarter to one?

The Court: Well, we had better look.

Q. That is my recollection. I can call it to your attention by number, Mr. Nutley. Just a minute. You are referring to plaintiff's Exhibit 3; I think it is 47. Isn't it paragraph 47?

A. It is paragraph 47, on page 23. A quarter to one, rock excavation.

Q. Yes. In other words, the computation, Mr. Nutley, is determined according to specifications?

(Testimony of V. E. Nutley.)

The Court: Does the rock have the same clearance, one foot, as the earth?

A. The rock has the same clearance at the bottom, yes.

The Court: One foot clearance on the bottom, and one quarter to one?

A. No, one quarter to one.

The Court: That's what I tried to say.

A. That's right, one quarter to one, and one to one for the common.

Mr. Holman: You may inquire.

Mr. Olson: Pardon me just a minute.

The Court: Were you through, Mr. Holman?

Mr. Holman: The witness indicated he hadn't quite finished.

A. Did I say that 1068 we computed the excavation that way? [221]

Direct Examination

(Continued)

By Mr. Holman:

Q. No, sir, I was asking about 1062.

A. I believe that's what we did on 1062.

Q. Now, will you tell me what you did on 1068?

Mr. Olson: Object to that as being immaterial, how they computed on 1068.

Mr. Holman: On the issues of this case, and if counsel is willing to accept the government computations as to quantities, I think it would be immaterial.

(Testimony of V. E. Nutley.)

Mr. Olson: Well, not if you're attempting to show that the Bureau and Mr. Maceri got together and computed it on some manner differently than the one foot out and one to one slope. That's what I anticipate the question calls for.

Mr. Holman: I don't see how counsel can impute that. I don't intend to infer the Bureau gets together with anybody.

The Court: I don't know what the answer will be. I understand this applies to the method of computation. I'll overrule the objection.

A. The point I was going to make, about that time we began making agreement with the contractor to pay him two feet out at the bottom and vertical side wall, and I don't know whether we did on 1068 or not. I don't think we did. I think 1068 was computed this same way, but I can't [222] remember, because we did do that about that time.

Mr. Holman: I am willing to have the question and answer stand or be stricken, just as counsel prefers.

Mr. Olson: Well, I'm satisfied with my objection as to immateriality.

Mr. Holman: In order to save the record I'll ask that the question and answer be stricken.

The Court: Yes, I think it should. It is of little value.

(Testimony of V. E. Nutley.)

Cross-Examination

By Mr. Olson:

Q. Mr. Nutley, it is a fact, is it not, that the computation for payment for excavation is made at the division office here in Yakima?

A. That's right.

Mr. Hawkins: I object to that as not proper cross-examination, your Honor.

The Court: Overrule the objection.

Q. Far as you yourself were concerned, you had nothing to do with making that computation?

A. Only supplying the data necessary for it.

Q. And then the computation was made, I believe, by Mr. Keeler here in Yakima?

A. By a man under his direction, yes.

Mr. Olson: That's all.

Mr. Holman: That's all, and may he be excused, counsel and your Honor?

The Court: Do you have any objection to excusing Mr. Nutley?

Mr. Olson: You will be subject to call, in case it is necessary?

Witness: You mean today?

Mr. Olson: No, on reasonable notice.

The Court: You will be at Sunnyside?

Witness: Yes.

The Court: Well, you will be given reasonable notice. You don't have to wait around your office all the time.

(Whereupon, there being no further questions, the witness was excused.)

J. C. HEERS

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name is Jess C. Heers?

A. That's right.

Q. And you reside at Sunnyside?

A. Yes.

Q. You were subpoenaed to attend here, were you?

A. That's right.

The Court: You'll have to speak up. [224]

Q. Mr. Heers, there has been offered for identification as Macri's number 13, through Mr. Pease of the Yakima office, the inspector's daily reports. I guess I'll have to open those. May I open them, Mr. Clerk? I want to refer to certain ones. I wish to refer to those, Mr. Heers, and ask you if you were for a time resident engineer on the portion of the Roza Reclamation Project known as 1062, schedule 1?

A. I was chief of party.

Q. Chief of party; thank you; and for what period of time?

A. It was from April 3 until July 11, 1944.

Q. 1944?

A. Yes, sir.

Q. Now, during that time did you have an opportunity—pardon me—did you make daily reports?

(Testimony of J. C. Heers.)

A. No; I believe I made three at the beginning of the job, before there were any inspectors on the job, I made an inspector's report.

Q. With reference to those reports, I direct your attention, you probably can find them quicker than any of us, to your report for April 14, 1944. Would you step there and see if you can find that?

A. Are these in chronological order here, or what?

Q. I presume so; that is just the way Mr. Pease brought them. Strike the question, Mr. Reporter. Will you refer to [225] that identification 13 and get the portion that bears your signature for that period, Mr. Heers? Can you find it, Mr. Heers?

A. I don't see it here—here's one, May 26.

The Court: What year?

A. Of 1944, and June 19, 1944.

Q. Can you find any entries for April, 1944?

A. Here's one May 25, and April 26.

Q. I see; now, can you find April 14?

A. April 14?

Q. Yes, sir. A. Yes, I have it here.

Q. With reference to that entry of April 14, will you read, please, what you entered, into the record?

Mr. Olson: Now, if the Court please, I don't think the report should be read into the record. I don't know what it is. If it is something that this witness saw, and he needs this report to refresh his

(Testimony of J. C. Heers.)

recollection to describe it, and it is material—I don't know what this is.

Mr. Holman: What I proposed to do with each of these witnesses, your Honor, was to have them read from the record the official factual report they made at that time.

The Court: The document the witness has has been [226] identified in bulk, if I might put it that way, but has not been admitted in evidence. I think Mr. Olson's point is that before any of this should be read into the record, it should be shown that the witness has personal knowledge, if it is a personal report he made.

Mr. Holman: I asked him if he signed it.

The Court: You asked him to get one he signed. I suppose if he signed it he knows its contents. You might develop it. Is that what you had in mind, Mr. Olson?

Mr. Olson: It goes further than that. There isn't anything sacred about one of these documents because it is in the Bureau of Reclamation. This is a job between Macri and the sub-contractor. I assume this is a field inspector who has gone out and seen something on the job, and if he has, and it is material, he can testify to it.

The Court: Of course, it would have to be admissible.

Mr. Olson: The fact he wrote it down and sent it to somebody it doesn't seem to me admits it in evidence.

The Court: You can show what it is.

(Testimony of J. C. Heers.)

Direct Examination
(Continued)

By Mr. Holman:

Q. Is that entry of that day one that you made in your own official capacity to your superior from your inspector in the field? [227]

A. Well, I was chief of party, and in the absence of an earthwork inspector I made an earthwork report. Ordinarily I wouldn't have made a report.

Q. And you did make that report to your superior? A. Yes.

Q. And that report bears your signature?

A. Yes, it does.

Q. And that's part of your official record you have taken out of identification 13?

A. Well, these are turned in to the office,

The Court: That pertains to which contract, 1062?

Q. 1062, your Honor. That's correct, is it not, pertaining to 1062?

A. That's right; it is marked on the sheet.

Q. Would you now read into the record that entry?

Mr. Olson: I make the same objection, your Honor, that the report made by the inspector to the Bureau of Reclamation is wholly immaterial, irrelevant and incompetent, insofar as the use plaintiff is concerned. There is no binding effect

(Testimony of J. C. Heers.)

on us, what kind of report he made. If he wants to describe what he saw out there, I think that is material.

The Court: I think the official reports here, if they are material, would be admissible. I'll overrule the objection. [228]

Mr. Holman: I might state, your Honor, we will meet the same situation with respect to each of these other witnesses. I'm willing that the record show counsel's objection.

The Court: Well, he can take care of that.

Witness: I have the equipment listed as the Bay City half yard hoe. The hoe was excavating stilling pool and a structure at lateral 59.3 to station 1 plus 75. The patrol grader is excavating earth, lateral 59.3 and branches.

Q. Is that as far as station I, plus 75?

A. That's right.

Mr. Holman: Now, may I request, Mr. Clerk, that that that he has read from be sub-marked by giving a sub-mark identification, and may we furnish a copy of that, your Honor?

The Clerk: Yes.

Mr. Holman: And then we'll offer that in evidence.

(Whereupon, Daily inspection report for April 14, 1944 (Heers) was marked Defendant Maceri's Exhibit No. 13-a for identification.)

Mr. Olson: What is the date of that?

Mr. Holman: April 14, 1944.

(Testimony of J. C. Heers.)

Q. Just as soon as the clerk is through, would you see if you have one for April 18, pertaining to specification [229] 1062, schedule 1?

A. Yes, I have.

Q. You have? A. Yes.

Q. Would you read that, please?

A. "Patrol grader completed excavation of lateral 59.3 to station 117, plus or minus, to E.O.L. (end of line). The Cat dozer was levelling 59.5. The half yard hoe was excavating for pipe line, lateral 59.3 station 37 plus 50 to station 44 plus 63. The half yard hoe was excavating road crossing at lateral 59.3-5, station 8 plus 80 to station 9 plus 40." Under remarks I have "Concrete Construction Company installing forms at lateral 59.3."

Mr. Holman: May I make a similar request, Mr. Clerk, and have that marked 13-b? In other words, is it practical, Mr. Clerk, to carry them under sub-numbers?

Clerk: Yes, I think we can.

Mr. Olson: We make the same objection, your Honor, to this—that is 4-18-44 you just read from?

A. Yes, that's right.

Mr. Olson: —to the reading of that into the record, and move it be stricken. It is wholly incompetent, irrelevant and immaterial, and constitutes only a report made by parties not parties to this suit, and no binding effect on the Concrete Construction Company. [230]

The Court: Overruled, and the motion to strike denied. Will that be 13-b, then?

(Testimony of J. C. Heers.)

Mr. Holman: Yes, your Honor.

The Court: And what is the date of that one?

A. April 18, 1944.

The Court: All right.

(Whereupon, daily inspection report for April 18, 1944 (Heers) was marked Defendant Macri's Exhibit No. 13-b for identification.)

Direct Examination
(Continued)

By Mr. Holman:

Q. Then the next, please, will you refer to your record for April 22, 1944?

A. "The half-yard hoe excavating for structures and pipe lines at lateral 59.3 and sub-laterals. Completed all pipe and structure excavation lateral 59.3 this day. Patrol grader excavating channel sections Lateral 60.3. Dozer levelling and grading on lateral 60.3."

The Court: What is the date of that?

A. April 22, 1944.

Mr. Holman: Will you have that marked 13-c?

(Whereupon, Daily inspection report for April 22, 1944 (Heers) was marked Defendant Macri's Exhibit No. 13-c for identification.)

Mr. Olson: We make the same objection and motion, your Honor. [231]

The Court: Same ruling.

Mr. Holman: You may inquire.

(Testimony of J. C. Heers.)

Mr. Olson: I have no questions.

Mr. Holman: That's all, Mr. Heers. May the witness be excused, your Honor?

The Court: Well, on the same condition, I assume, that he will be available.

Mr. Holman: Mr. Clerk, may I request that you have copies made of that at my cost, 13-a, b, and c, and then I'll offer them. Your Honor, may I ask one more question of Mr. Heers?

Q. Mr. Heers, you were subpoenaed to be here, were you not? A. I beg pardon?

Q. You were subpoenaed to be here, a subpoena was served on you? A. Yes.

(Whereupon, there being no further questions, the witness was excused.)

R. M. MOORHEAD

called as a witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name is R. M. Moorhead?

A. Yes, sir.

Q. You're known as Ray Moorhead? [232]

A. That's right.

Q. You reside at Sunnyside, Mr. Moorhead? What was your position, if any, with the Bureau of Reclamation in the year 1944?

A. I was a concrete inspector.

(Testimony of R. M. Moorhead.)

Q. On what project?

A. On the Roza Project.

Q. And what specifications?

A. Well, 1057, 1062, 1060.

Q. 1057, whose work was that? A. 1060?

Q. No, 1057. A. Murphy Campbell.

Q. What was the next one?

A. 1060 was Osburg and Ludberg.

Q. What other ones?

A. 1060 was Osburg and Ludberg.

Q. Yes; did you name some others?

A. No, I didn't.

Q. Were you on 1062? A. Yes.

Q. Schedule 1? A. Schedule 1.

Q. Mr. Moorhead, I direct your attention to what has been marked Macri's identification 13, the inspector's daily [233] reports. Would you kindly step there to the Clerk's desk and find the reports, any reports signed by you? I want to refer particularly to the month of August, 1944.

A. Here's August.

Q. Bearing your signature, Mr. Moorhead?

A. I have but one for the month of August.

Q. Sir?

A. I have but one report during the month of August, and that was the day that I relieved one of the other inspectors there.

Q. Pardon me just a minute; what inspector were you relieving? A. Mr. Reynolds.

Q. Well, are there any reports there for August 1, 2, 4, 7, 10, 11, 12?

(Testimony of R. M. Moorhead.)

A. Well, there should be.

Q. Will you please locate, if you can, your report for August 1, 1944, signed by you, with reference to specification 1062? A. Yes, sir.

Q. Will you read that, please?

Mr. Olson: For the purpose of the record, your Honor, I think perhaps it would be best if we made our same objection we made before to all this type of evidence, a continuing objection. [234]

The Court: The record may show the plaintiff objects, and objection will be overruled.

A. "Placed 66 one-sack batches concrete in structures 25, 26, 38, 38a, 29, 30, for 11.8 yards."

Q. Now, does that mean 11.8 yards—strike, please; have you any other statement there?

A. "Delays and time wasted, three hours moving and waiting on trucks."

Mr. Holman: May I have that marked for identification? Will that take another 13 sub-number, Mr. Clerk?

(Whereupon, Daily inspection report for August 1, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-d for identification.)

Q. You have one for August 2, have you, Mr. Moorhead?

A. I believe so; August 2, '44.

Q. Would you read that, please?

A. "Strip structures 38a, 29, 30, 31, 32, on Lateral 59.3."

(Testimony of R. M. Moorhead.)

Q. Anything else?

A. "Down for repairs of equipment."

Q. Anything else? A. Nothing further.

Q. Did you show the foreman?

A. Schaefer, foreman. [236]

Mr. Holman: I ask that be marked 13-e, your Honor.

(Whereupon, Daily inspection report for August 2, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-e for identification.)

Q. Have you any entry for August 4, 1944?

A. August 4, 1944.

Q. Will you read that, please?

A. "Placed eleven 6-sack batches in structures 21, 22, 23, 24, 27, 28; 11.85 cubic yards."

Q. Anything else?

A. "Still having trouble keeping equipment running."

Q. Is the foreman shown? A. "Wettie."

Q. How do you spell it?

A. W-e-t-t-i-e; that's the way I have it here.

Q. Do you know what the correct spelling is? Is that the correct spelling?

A. Well, I think that it is. I'm not so positive, though.

Mr. Holman: I ask that be marked 13-f for the same purpose, your Honor.

(Whereupon, Daily inspection report for August 4, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-f for identification.)

(Testimony of R. M. Moorhead.)

Q. I notice with reference to the 1944 calendar, Mr. Moorhead, that the 5th is Saturday and the 6th is Sunday. Do [236] you have any entries for those days? You have none for the 5th or 6th?

A. I don't see any under my name.

Q. Do you have one for Monday, the 7th?

A. One for the 7th, yes, sir.

Q. Would you read that, please?

A. "Placed nineteen 6-sack batches concrete in structures 22a, 15, 16, 17, 18, 19, 20, 36, 37, on lateral 59.3 and 59.3-5."

Q. What does 3-5 mean?

A. Well, this is a branch off the main lateral.

Q. Anything else?

A. "Not working very smooth."

Q. Foreman shown? A. Schaefer.

Mr. Holman: I ask that be marked 13-g in the same way, your Honor.

(Whereupon, Daily inspection report for August 7, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-g for identification.)

Q. Do you have one for the 8th, 9th, or 10th?

A. On August 8, 1944.

Q. I mean pertaining to these jobs?

A. Yes.

Q. Go ahead. [237]

A. "Placing concrete in structures 11, 12, 13, 14, 34, 35; twelve 6-sack batches; 12.92 cubic yards. Stripping 18, 19, 20, 22a."

(Testimony of R. M. Moorhead.)

Q. And a foreman? A. "Schaefer."

Mr. Holman: I ask that be marked 13-h, your Honor.

(Whereupon, Daily inspection report for August 8, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-h for identification.)

Q. Do you have one for the 9th?

A. August 9, '44.

Q. Read that, please.

A. "Placed structures 33, 7, 8, 9, 10; ninety 1-sack batches; 16.1 cubic yards."

Q. Anything else? A. Nothing further.

Q. Foreman?

A. Wettie, or Waltie, or whatever the name is. I don't just know.

Mr. Holman: I ask that be marked 13-i, your Honor.

(Whereupon, Daily inspection report for August 9, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-i for identification.)

Q. Do you have one for August 10, Mr. Moorhead? A. August 10, '44. [238]

Q. Read that, please.

A. "Stripping structures 13, 14, 36, 37; checked all forms on 59.5 lateral; no concrete placed today."

Q. And the foreman? A. Schaefer.

(Testimony of R. M. Moorhead.)

Mr. Holman: May that be marked 13-j, please?

(Whereupon, Daily inspection report for August 10, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-i for identification.)

Q. Do you have one for the 11th, Mr. Moorhead?

A. August 11, 1944; "Stripped structures 7, 8, 9, 10, 11, 12; checked structures 46, 47, 48, 49, 50, 51, 52, 53, on lateral 59.9."

Q. Anything else?

A. Well, there is a note on the bottom here, but it doesn't pertain to this; it refers to another job.

Q. What job does it refer to?

A. Specification 1061.

Q. I don't want that read, then.

Mr. Holman: I ask that be marked 13-k, please.

(Whereupon, Daily inspection report for August 11, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-k for identification.)

Q. Do you have one for the 12th, Mr. Moorhead?

A. I don't believe so. [239]

Q. August 12, that is a Saturday. You don't have that?

A. I don't think so.

Q. I thought there was one in there where you said something about going to 1060. You have none for August 12. You have one for what date next, please?

A. I have one for the 15th here.

(Testimony of R. M. Moorhead.)

Q. August 15; will you read that, please?

A. August 15, '44; "Placed concrete in structures 42, 43, 44, 45, 45a, lateral 59.5, structures 46, 47, 49, 50, lateral 59.9; 17 batches, 18 $\frac{1}{4}$ yards."

Q. Foreman? A. "Schaefer."

Mr. Holman: I ask that be marked 13-1, your Honor.

(Whereupon, Daily inspection report for August 15, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-1 for identification.)

Q. Do you have one for—that's all that you have, Mr. Moorhead? A. I think so, sir.

Q. Passing now, Mr. Moorhead, to your time you were there, did you have occasion to see whether or not, that is, to see how the work was performed by the Concrete Construction Company with reference to place on the lateral 59.3 where they started, how they worked?

A. You mean at which point they began work?

Q. Yes, sir, and what way they worked.

A. Well, it didn't make any particular difference to us which way they began.

Q. No, I asked you if you saw where they started. Do you remember where they started and which way they worked?

A. I believe they began at the lower end of the lateral.

Q. Sir?

A. They began at the lower end of the lateral, or down toward the end of it.

(Testimony of R. M. Moorhead.)

Q. Would that be going backward on the stations, then, or forward?

A. Well, it would be going backward on the stations, from the lower end.

Q. And can you tell me whether or not the excavation was dug ahead, the excavations for structures?

A. Well, on that particular lateral where we were placing concrete the excavations had all been completed.

Q. And was fine grading being done, or had been done?

A. Well, the structure forms were set in the ground, so the fine grading was——

Q. Oh, they had them set in the ground when you were there? Do you recall any instance of any high or low grade when you were there?

A. Well, I can't remember of any particular case.

Q. With reference to what has been marked Exhibit 12, I'll [241] ask you whether or not you prepared those lay-out sheets for this job, Mr. Moorhead?

A. Well, I didn't prepare them; however, I traced these particular sheets.

Q. Oh, you traced these particular ones?

A. Yes.

Q. Well, all I wanted to bring out, those came from the Bureau of Reclamation and are official records that are sent out?

A. That's right, subject to alterations.

(Testimony of R. M. Moorhead.)

Q. Yes, sir; and I notice there in several places there are structures crossed off and marked "revised". What would that mean?

A. That would mean that that structure had been revised and is either eliminated or revised.

Q. Either eliminated, or a substitute structure?

A. That's right.

Q. Can you tell me whether or not while you were there on 1062, schedule 1, new or old lumber was used for the forms?

A. Well, they started out with new lumber with the structures while I was there.

Q. And how long had the forms been built when you came there, Mr. Moorhead?

A. Well, the first time that I went over to this particular [242] job was on the 24th of July, and the forms for about 25 or 30 structures, I would say, were already set for concrete. Now, how long before that—they had been working on them some time—how long before that they had placed the first one——

Q. Can you tell me whether or not at that time they gave any appearance of being weathered, by not being filled with concrete?

A. Yes, they were using ship-lap, 8 inch ship-lap in some of the forms, and they had shrunk so much that cracks were visible through them.

Q. From your experience in the field can you tell me whether or not that would be a normal effect of the elements, temperature, heat, and wind?

A. Well, it is the effect of the heat on unseasoned lumber.

Mr. Holman: You may inquire.

(Testimony of R. M. Moorhead.)

Cross-Examination

By Mr. Olson:

Q. Now, Mr. Moorhead, as I understand it you inspected the first structures that were installed on this project 1062?

A. The first—I believe the first two laterals, or three.

Q. And that would be about the first 25 or 30 structures, is that correct?

The Court: Speak up, instead of nodding your head.

A. That's about right.

Q. The reporter has to get it in the record. Now, you were [243] one of the crew known as the inspectors or field men? A. That's right.

Q. As I understand it, Mr. Moorhead, it was your function to inspect the structures after it had been placed in place in the excavation, and give it an OK before the Concrete Construction Company could commence pouring concrete?

A. That's right.

Q. Then in each instance the Concrete Construction Company on 1062 would have to build the forms in the excavation and then have the OK of yourself or some other inspector before they could pour the concrete? A. That's right.

Q. Now, did you or did you not inspect the excavation before the concrete structure was placed in it? A. No.

(Testimony of R. M. Moorhead.)

Q. In other words, the Bureau was not interested in who made the excavation, as I understand it? A. That's right.

Q. As long as by the time the forms and the panels were in place that they were right?

A. That's all we were interested in, as far as placing the concrete is concerned.

Q. And how much trouble the Concrete Construction Company had, or had to go to, or how much excavation they had to [244] go to, in order to get these forms in place, the Bureau and yourself as an inspector was not concerned?

A. That's right.

Q. And you made no record of that on your inspection? A. No record.

Q. As a matter of fact, you weren't even called to the structure until the Concrete Construction Company had completed installation of the forms?

A. When they had the forms set and ready for concrete, why, we went up and checked it as to grade and dimensions, and if it was satisfactory, why, we give them the OK to place the concrete.

Q. So what shape the hole itself was in when the Concrete Construction Company's carpenters first got there to place the forms, you wouldn't know about? A. No, sir.

Mr. Holman: Just a minute; I object as argumentative.

The Court: Well, it's cross-examination. I'll overrule the objection.

(Testimony of R. M. Moorhead.)

Q. Now, you did have an opportunity to observe, I assume, Mr. Moorhead, the question as to—I mean the situation of the banks of the excavations as they existed along the side of the panels of the structures?

A. Yes, I saw a good many of them, before the forms were in [245] them and afterwards.

Q. And the fact it, is it not, that those walls were vertical, straight up and down, practically?

A. For the most part they were. The deep ones especially were practically vertical sides.

Q. They were not sides what you would call one to one slope?

A. That's right, they were not.

Q. They were not. Now, realizing, Mr. Moorhead, that it wasn't a part of your work to check excavations or to check the work of the carpenters until the structure form was complete, still, being on the job there as you were, did you have an opportunity and did you observe the Concrete Construction Company's crew doing excavating?

Mr. Holman: I object to that as not proper cross-examination, your Honor.

The Court: Overruled.

A. Well, there's hardly any construction but what there is some shovelling going on around; now, whether it's any specific quantity I wouldn't say, but there's always more or less digging around there when you're placing or setting a structure.

(Testimony of R. M. Moorhead.)

The Court: I don't believe that's an answer to the question. Perhaps he can't answer it directly, but will you read it?

(Whereupon, the reporter read the last previous [246] question.)

The Court: You haven't yet said whether you did or whether you didn't. You can answer it or say you can't answer it, one or the other.

A. Well, I wouldn't say they were excavating.

Q. Well, what were they doing?

A. Well, they might have been levelling up the sub-grade, or something of that sort.

Q. You saw them working with shovels?

Mr. Holman: I move the latter part be stricken as conjecture, your Honor.

The Court: Well, I'll let it stand. He can tell what he saw there, and not draw conclusions.

Q. You did see them, Mr. Moorhead, the carpenters, working with shovels in the excavations?

A. Yes, I seen them using shovels.

Q. And did you also see them at times doing back filling in order to get the floor of the excavation to proper grade?

A. Occasionally that has been the case.

Q. Now, as I understand it, when you would see this it would be by chance, because you were not out there to inspect the excavations ahead of time?

A. That's right.

Q. Now, when you got on the job, as I understand you to say, it was about July 21, 1944? [247]

(Testimony of R. M. Moorhead.)

A. 24th, I believe, was the first day that I was over there.

Q. And at that time there were approximately 25 structures the forms for which were already in place?

A. That's right.

Q. And looked like they had been there for some time?

A. Yes, sir.

Q. Now, how long would it take, if you know, to pour 25 structures?

A. Oh, normal operation——

Mr. Holman: Just one minute. Your Honor, I submit it is not proper cross-examination, and I submit that the witness has not qualified himself as a concrete man, as a concrete operator, I mean.

The Court: I thought his qualifications were admitted.

Mr. Holman: Yes, as to concrete inspector, your Honor. Now counsel asked him about operations, which is not proper cross-examination.

The Court: He must be an engineer; didn't he draw some of these drawings and such as that?

Mr. Holman: I'll withdraw it, your Honor.

The Court: I thought you asked him if he didn't prepare this book of plans, the layout, and if he prepared that I assume he would be more than a mere inspector. [248]

Mr. Holman: I meant, your Honor, in his qualifications that he's given there is no operating experience.

The Court: Yes, that's true. Well, I'll overrule the objection.

(Testimony of R. M. Moorhead.)

Witness: I would say about two days, or possibly three, would place all the concrete in that number of structures.

Q. So that when you got there on July 21 there was about two to three days' pouring of concrete that was ready? A. That's right.

Mr. Holman: Oh, just a minute. Your Honor, I submit that that question—may I hear the question?

The Court: That's virtually a repetition of what he said before.

Mr. Olson: I would have said structures ready for pouring of concrete. My question wasn't very well worded, your Honor. I should have said that there was structures ready for two to three days' pouring of concrete.

The Court: If I understand the witness' testimony correctly he testified not that all this work would require two days, but that there was two days' pouring ready with the forms set, and it would take two or three days to pour it; is that right? A. That's right.

The Court: I think we'll recess now for [249] ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

The Court: Had you finished your cross-examination, Mr. Olson?

Mr. Olson: Not quite, your Honor.

(Testimony of R. M. Moorhead.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Moorhead, you said that the ship-lap that had been used and furnished in connection with making these forms was eight inches; that's the width, I take it?

A. That is the width, yes.

Q. And that they had on July 24 or 21, whichever it was you got there, that it had shrunk so that there was cracks in it? A. That's right.

Q. Now, would that necessitate the rebuilding of those forms in order to pour concrete?

A. Well, in some cases it did. Part of them we let go, and a few of them we made them take the boards off and do it over.

Q. Some of the forms you made the Concrete Construction Company remove and replace?

A. Take the boards off and push them back together and close the cracks. [250]

Q. Did you say that shrinkage was caused by the lumber being unseasoned lumber?

A. I would say it was green lumber, and exposure to the sun and wind caused it to dry and shrink.

Q. And that happened quite rapidly? If you had wet lumber out on the Roza Project in Yakima County in the middle of July it would shrink pretty fast? A. That's right.

Q. Now, you mentioned something in one of your reports there about there being some delay,

(Testimony of R. M. Moorhead.)

or something about there being some equipment broken down. The concrete equipment that Mr. Schaefer had on this job was brand new equipment, wasn't it?

A. I believe the mixer was a new machine, practically new, and he had a Buggymobile out there that was new. The trucks were used trucks, for the most part. I don't recall seeing a new truck.

Q. I think that you mentioned his trucks, or that they lost some time waiting for a truck.

A. Well, they had to drive from the scene of operations, where they placed the concrete, back to the stock pile where they filled the aggregates.

Q. Do you know what was the matter with the trucks on that day you referred to?

A. No, I can't say just what the trouble was.

Q. Do you know anything about the trouble the trucks had?

A. Well, I remember one that was loaded too heavily on the rear, started up a grade, and tipped up in the air, the front end in the air.

Q. What kind of roads did they have out there?

Mr. Holman: I object to that as outside the issues under the sub-contractor's evidence, the plaintiff's exhibit 1.

Mr. Olson: That's a matter we will have to argue.

The Court: I'll admit the evidence. I know there is a question who is responsible for building the roads.

(Testimony of R. M. Moorhead.)

Mr. Holman: No provision in the sub-contract for building roads, your Honor.

The Court: I beg your pardon?

Mr. Holman: Fixing the obligation for the roads.

Mr. Olson: Well, we think there is.

The Court: The record will show an objection, and I'll overrule it.

Mr. Hawkins: Will the record also show the objection as to Goerig & Philp? I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Cross-Examination

(Continued)

By Mr. Olson:

Q. Were there any roads furnished by Macri and Company for Concrete Construction Company out on the project?

Mr. Holman: Objected for the reason it is not proper cross-examination or within the issues.

The Court: Sustain the objection to that as a little too broad. You can show he knew about it.

Q. Mr. Moorhead, was any of this truck trouble that you referred to in your report caused by there being no roads, if you know?

Mr. Holman: Objected to, your Honor, for two reasons, that it is not proper cross-examination,

(Testimony of R. M. Moorhead.)

and the witness is not shown qualified as either a truck operator or a mechanic.

Mr. Olson: If your Honor please, they put in these records; that's one of the things I was objecting to on the record. Here's a report that has a certain notation, and counsel wants to put that in, and says "You can't ask anything about it."

The Court: I'll overrule the objection. He's shown there was delay on account of truck trouble.

Mr. Olson: I'm trying to find out what it is, if Mr. Moorhead knows. If he doesn't, I'm satisfied.

Witness: Do you want me to answer the question regarding the roads? [253]

Q. No, the Court ruled against me. I'm asking if, in your report you mentioned some delay waiting for trucks, if you know whether the truck trouble and waiting for the trucks was connected with the road situation. Do you know whether or not it was?

A. Well, I can't say that it was the road situation. I don't remember whether they were delayed at the batching plant or whether they were stuck on the road between there and the scene of operations, or what was the delay. Offhand I can't recall.

Q. All right. As I understand it you don't have any records at all showing checking on the excavations, as to their grade?

A. We never checked the grading of an excavation until the structure was set, ready for con-

(Testimony of R. M. Moorhead.)

crete, and then we never checked the sub-grade unless it appeared to be out of line considerable.

Q. And when you got to pouring concrete, or when you got there on this July 24 so that you found these 25 structures ready for concrete pouring, do you know whether or not there were any excavations ahead which had been completed to the extent that the sub-grade and floor was completed and ready for receiving concrete forms?

A. I don't know as to the sub-grade. I know there was some [254] excavations ahead, because you could see them ahead on the different laterals. Whether they had been fine graded or not I don't know.

Q. And by fine grading you mean completion of the floor so that it would receive the structure?

A. I mean brought up or cut down to the neat lines, where the concrete would be placed on the invert.

Cross-Examination

By Mr. Hawkins:

Q. What is the character of the soil?

A. Well, it is a light volcanic ash, for the most part. Some of it is a little rocky.

Q. It blows with the wind, I suppose?

A. If it is loose it blows, yes.

Q. And if you don't get in with the structures right away, if it is windy the soil would drift in to a certain extent, wouldn't it?

A. It would blow in some, yes.

(Testimony of R. M. Moorhead.)

Redirect Examination

By Mr. Holman:

Q. Mr. Moorhead, you spoke of lumber being exposed to the sun and wind, and the shrinkage. If the structure when completed had been poured with concrete would that have happened?

A. Well, not necessarily, unless it was poured after they had been sitting there a considerable time.

Q. I mean if it was poured currently, when they were sitting [255] there, it would not have happened?

A. No, within a few days, a few——

Q. I mean normal pouring.

Mr. Olson: Do you mean normal pouring, or within a few days?

Witness: Well, if it was placed within three or four days after the structure was set I would say that it would not shrink much.

Mr. Holman: That's all, Mr. Moorhead.

Mr. Olson: That's all, thank you, Mr. Moorhead.

Mr. Holman: And all these witnesses may be excused?

Mr. Olson: Yes, subject to call.

(Whereupon, there being no further questions, the witness was excused.)

G. R. REYNOLDS

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Would you give your name and place of residence, Mr. Reynolds, and your official position?

A. Well, I live here in Yakima, and I work as a concrete inspector.

Q. For the Bureau of Reclamation?

A. Yes, Bureau of Reclamation. [256]

Q. Was that so in the year 1944?

A. Well, some of the time.

Q. And have you worked, in the year 1944 were you on the Roza Project, specification 1062, schedule 1?

A. Well, just some of the time; I think from August on.

Q. And did you make daily reports?

A. Yes, I made daily reports.

Q. With reference to identification 13 will you find those reports that are signed by you in the period between August, 1944, and February, 1945, Mr. Reynolds? Those bearing your signature?

A. I think there's 200 of them. What date did you want?

Q. Beginning with August, 1944, Mr. Reynolds.

A. August what date?

Q. '44; 1944.

A. Yes, I have that, but what date particularly did you want?

(Testimony of G. R. Reynolds.)

Q. You have an entry for August 15, 1944, that pertains to 1062 and the operation, the concrete structure operation? A. Here it is.

Q. All right; that bears your signature and was made currently, was it, Mr. Reynolds?

A. Well, no, it don't. I think Costello wrote that.

Q. I want your report, not Costello's. Have you got [257] one on the 16th, August 16, 1944?

A. I have one for the 16th.

Q. Will you give that, please? Read it, please, into the record.

A. I may have one for the 15th. I'll look for it. Here's one for the 16th.

Q. All right, read that, please.

The Court: Is that your report?

A. That's my report. "No concrete placed this shift. The loading tower on the mixer mobile was taken off as the going was getting rougher, and too much weight to pull. All the structures on lateral 59.5 was stripped, 39 to 45 and 45-a."

Mr. Olson: What was the date on that?

A. This was the 16th.

Q. Of what month? A. August.

Mr. Holman: Mr. Clerk, I wonder if we're going to run out of the alphabet?

The Clerk: I'm going to indicate this with a mark of my own, and afterwards in making the copies we'll mark all of Reynolds' reports as 13-m.

Mr. Holman: And sub-numbers 13-m-1, 2, 3 and so forth?

(Testimony of G. R. Reynolds.)

The Clerk: No, they will each carry their [258] own date. I thought I would mark the whole batch as 13-m.

The Court: How many of these will you use for this witness, do you think, Mr. Holman?

Mr. Holman: 20 or 25, your Honor.

The Court: It seems to me it is a waste of time and duplication to read these into the record if you're going to introduce them later on. We'll have them both in the record and as an exhibit.

Mr. Holman: Then may I refer to the dates, and have the clerk take those?

The Court: I think it would save time if you would identify them as to date, and offer them in evidence.

Mr. Holman: I wanted to avoid making a lot of copies not pertinent to this case. These men are on different jobs.

The Court: Yes, but I understand these that are read into the record, you propose to introduce in evidence anyway.

Q. Will you tell me whether or not you have an entry for September 22, 1944?

A. September—

The Court: You'll get those as you go along, Mr. Clerk, and you will know what is to be included in the exhibits. Now, this one was what?

The Clerk: This one is September 22.

Q. Pardon me—ahead of that, August 31.

A. August 31. Here's August 31.

(Testimony of G. R. Reynolds.)

Mr. Holman: All right, will you mark that, please, Mr. Clerk?

Q. Then September 1. Do you find it, Mr. Reynolds? A. Not yet.

The Court: How many more of these witnesses do you have, Mr. Holman?

Mr. Holman: I have two more.

The Court: I wonder if during the lunch hour they couldn't wade through this mass of material and pick out their own reports, instead of doing it while the Court is in session?

Mr. Holman: I will be willing to withdraw Mr. Reynolds now, and do that, your Honor. Mr. Reynolds, would you during the lunch hour check the dates that I'll give you and pick out the reports?

Witness: O. K.

Mr. Holman: Could they go to the jury room and do this now, your Honor?

The Court: I have no objection to that, if counsel hasn't. You can take this identification 13 out and pick out the ones they have made, and then they can be in a position to identify them without all this delay [260] of searching through them while we're in session. The two other witnesses will do the same thing?

Mr. Holman: Yes, Mr. Costello and Mr. Sektnon.

The Court: You can take that with you then, all those daily reports.

Witness: You mean take them now?

The Court: Yes, you may take them now out to the jury room or grand jury room and look

(Testimony of G. R. Reynolds.)

them over. Do you have the particular dates that you can give them, Mr. Holman?

Mr. Olson: While Mr. Holman is getting those figures, your Honor, I intended to have these models identified, and I want the witnesses to be around them. Now, is it more convenient to the Court to have them located where they are?

The Court: I think that's a good place. They can step over there.

Mr. Olson: I want the witnesses to be around them. If that's a good place I can have the witnesses come around.

The Court: I think that's a good place. If you want to, we can have the Clerk identify them now.

(Whereupon, Model of excavation for structure showing 1 to 1 banks was marked Plaintiff's Exhibit No. 23 for identification.) [261]

(Whereupon, Model of poured forms of concrete was marked Plaintiff's Exhibit No. 24 for identification.)

(Whereupon, Model of excavation for structure showing vertical banks was marked Plaintiff's Exhibit No. 25 for identification.)

(Whereupon, Model of poured forms for concrete was marked Plaintiff's Exhibit No. 26 for identification.)

(Whereupon, the witness Reynolds was temporarily excused from the witness stand.)

Mr. Olson: Shall I resume with Mr. Schaefer?

The Court: Yes, all right. [262]

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, we ended up yesterday, I believe, with your relating the substance of the conversation which took place on April 29, 1944. Now, were you on the project again during May, 1944?

A. Yes, I was, on May 19.

Q. And what took place on that date, or what did you see or observe or do?

A. Well, on May 19 there was no work going on, and the materials, that is, there was no lumber, and I instructed the——

Mr. Holman: Just a minute. I object, your Honor; he was asked what took place.

Mr. Olson: And what he did.

The Court: Yes, I think that answers the question. You're objecting to what instructions he gave someone?

Mr. Holman: Yes, sir. That calls for a separate question.

Mr. Olson: I asked what he did, your Honor. I would just as soon ask another question.

Direct Examination

(Continued)

By Mr. Olson:

Q. Did you inspect any of the excavations, Mr. Schaefer?

A. Yes, I did.

(Testimony of M. C. Schaefer.)

Q. And what was the situation with respect to the excavations?

A. The situation on the excavations was that there was no fine grading ahead of the setting crew, and as to the [263] yard work, there was no lumber in the yard, so I told the superintendent——

Mr. Holman: Again I object.

Q. All right, don't say what was said. Counsel is objecting to that. Now, you say there was no fine grading done in the excavations. Were there any excavations completed so that the carpenters could come and install the forms without doing additional excavating work?

Mr. Holman: I object to that type of question as leading. It suggests the answer.

The Court: It is leading. I'll sustain the objection.

Q. Well, then, explain, Mr. Schaefer, what you mean by saying there was no excavations fine graded.

A. Well, the excavations that we checked on that day were not excavated to sub-grade to receive the concrete at the inverts of the structure, the side walls of the excavation would require additional digging in order to accommodate the forms, and there was just no excavation there ready for forms.

Q. And what did you do about it then? What did you say? Who did you say it to?

(Testimony of M. C. Schaefer.)

Mr. Holman: That first, to whom did he say it, what did he say, I would like to know to whom he was talking. [264]

The Court: Yes, perhaps that would be the logical way.

Witness: I said to Fred Waltie——

Q. That is your foreman?

A. That's our superintendent on the job at that time.

Q. All right, what did you say?

Mr. Holman: Object to it, your Honor, as not binding on any of the defendants unless they were shown present or it was shown communicated within five days.

Mr. Olson: Well, I'll say to the Court and counsel that what I propose to show is that we pulled off the job. Now, I'm not offering any conversation between him and Mr. Waltie for proving any fact that exists other than the fact that there wasn't any work to do and we went home.

Mr. Holman: Object to that. It is immaterial, your Honor. It is a question of his own responsibility under his contract.

The Court: Well, we want to know what happened out there. I think you can show what directions or instruction he gave his men, without going into detail.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. What did you do then?

A. I instructed my superintendent on the job to come back to Portland with the men that were up there from Portland, [265] and to leave only John Klugg and Monrad at the shop to do such little repair work and tie steel as it was possible for two men to do.

Q. And was that done?

A. That was done, and the——

Mr. Holman: Object to that as volunteered, from this point on. He's answered the question.

(Whereupon, Model of excavation for structure showing 1 to 1 banks was marked Plaintiff's Exhibit No. 23 for identification.)

(Whereupon, Model of poured forms for concrete was marked Plaintiff's Exhibit No. 24 for identification.)

Q. Now, referring to plaintiff's identification number 23, would you explain to the Court, you undoubtedly will have to remove the structure to do it, just what this fine grading is as you use the term, what you refer to with reference to that model excavation, what constitutes the fine grading?

Mr. Holman: Objected to as not proper procedure. First what 23 is should be shown into the record, and by whom it is prepared, and from what sources it is prepared, before it is submitted.

(Testimony of M. C. Schaefer.)

Mr. Olson: That is true, I'll have to do that before I offer this in evidence, which I will do. I'm [266] simply asking this witness to illustrate what the fine grading is, by means of this identification, which assume he can do.

The Court: Well, I think it would be the same as a map or diagram. Before detailed evidence is admitted it should be identified and offered. I think it would be appropriate procedure to show what this is and who prepared it and what it represents, and if it is admitted the witness may use it to illustrate his testimony.

Mr. Olson: Another witness did it, your Honor, and I can't do it by Mr. Schaefer.

The Court: All right.

Direct Examination
(Continued)

By Mr. Olson:

Q. Now, when did you next come back on to the job?

A. That was June 29. I had two men head back for the job at that time.

Mr. Holman: Would you read that answer, please?

(Whereupon, the reporter read the last previous answer.)

Mr. Holman: I move that be stricken, your Honor. He was asked when he came back to the job.

(Testimony of M. C. Schaefer.)

The Court: Well, I suppose that would mean he and his establishment.

Mr. Olson: I have no objection to it being stricken. I was asking when he came back. [267]

The Court: When he personally came back? All right, it may be stricken.

Direct Examination

(Continued)

By Mr. Olson:

Q. When did you personally come back to the job? A. That I couldn't say.

Q. I'll ask you this, Mr. Schaefer: Did you arrange a meeting with Mr. Macri on the job after you had pulled off and gone to Portland, did you arrange a meeting?

A. Yes, that was on June 15.

Q. All right, did you come back on that date?

A. I came back to the job for that meeting.

Q. All right, now tell us about it.

A. There was Fred Waltie, Allyn Hunter, and I drove to the job office.

Q. Who is Mr. Hunter?

A. Al Hunter is the representative of Rogers Insurance Company.

Mr. Holman: Of what?

Q. Rogers Insurance Company.

A. Of Rogers Insurance Company.

Q. Is he their engineer, or do you know?

A. Well, he's an engineer, I imagine.

(Testimony of M. C. Schaefer.)

Q. Well, if you don't know, Matt, go ahead; just tell what the set-up is, what took place.

A. We met Mr. Macri and his engineer, Mr. Cohen. We went [268] out to the site, and we checked six or seven of the structures, and I pointed out the condition of the excavations, the condition of the set forms where we had set some outside forms so that the Macri crew would know where to crib and back fill, and where they had so back filled, and the back fill hadn't been compacted, and I brought that to Mr. Macri's attention. He says, "Well, that hasn't anything to do with you, that's part of the inspector's job". I said, "That's true, but I sure expect to hear about it if the structure cracks; however, that's minor detail. When are you going to get your crew in here, these shovels you talk about, and ample men, lumber on the job, so we will not be stymied?"

Q. Was Macri excavating at that time?

A. There was nothing going on. The shovel, I'm positive, was broke down, and was in the yard.

Q. Did he have any hand excavating crew on the job?

A. He did not. There was no one on the job. I said, "Back before we figured the job, your superintendent thought and asked whether we cared to figure on this work"——

Mr. Holman: Just a minute. I object to that as repetitious, your Honor.

The Court: This has not been gone into before, has it?

(Testimony of M. C. Schaefer.)

Mr. Holman: Well, he previously told about the superintendent [269] writing.

The Court: Well, this is a different conversation from what he testified to before, I understand. Objection overruled.

A. (Continuing): "Your superintendent, Mr. Staples, in this letter to me before we figured the job said that"——

Mr. Holman: Just a minute. I object. That is not the best evidence. He can produce the letter.

The Court: He's telling what Macri said.

Mr. Holman: No, what he said.

The Court: Well, what he said to Macri. He can detail the conversation even though it mentions the document. Overruled.

A. (Continuing): —— "said they would be ready for concrete in two or three weeks. Here we are, stymied like this". He said "Yes, you told me Staples was a good man". I said "I never said anything of the kind, but if he had any co-operation from you he would have done a whole lot better, because you've been telling him to lay off, and then giving him these instructions. I don't believe you've ever given him instructions to excavate according to specification, otherwise he would be doing it". Mr. Macri said "We're getting started; what are you hollering about?" I said "Well, we're to have two jobs out of the road by September 15. We won't be through with even this [270] job by September 15". He said "Nobody's lost any money on my job. We'll be out by September 15. This little excavating, you go ahead and do it. We'll

(Testimony of M. C. Schaefer.)

pay for it". I said "That isn't all you're going to pay for. You're going to pay all the costs, all the expenses, all the extras". He said "Well, I told you that before; quit arguing".

Mr. Hawkins: Your Honor, I again move that this testimony be stricken, as I did yesterday. They are attempting to vary a written contract by parol evidence.

The Court: Overruled.

Q. (Continuing): Well, he said that he would have an engineer on the job Monday, that he would have another shovel on the job, and that there would be ample lumber, and for us to get back on the job. I said "No, we're not coming back on the job yet; you get some holes ahead". He says "You're not going to have to wait for anything any more. You just get back here and get going". I says "We'll want to have enough holes ahead for at least eighty structures of concrete, or so we'll have at least four days of pour, and we want to pour twenty yards as our average; that means every day's pour".

Q. How many days' pour were there ready for you then, on June 15, if you know?

A. Well, I wouldn't just say. I think that there was probably [271] about——

Q. Well, let's go ahead and finish this conversation before noon.

A. So then I said "All right, Mr. Macri, you've agreed to pay for all the additional cost and expense.——"

(Testimony of M. C. Schaefer.)

Mr. Hawkins: Your Honor, I hate to keep interrupting, but I do object to this testimony, which attempts to vary this written document. We went into this at some length yesterday.

The Court: I think we did.

Mr. Hawkins: I do want to protect the record.

The Court: You can protect the record by making objection.

Mr. Hawkins: Yes, that's what I'm doing.

The Court: This conversation was long after the contract was entered into and partly executed, wasn't it?

Mr. Hawkins: It was long after the contract was entered into, and it is a contract which was required to be in writing, and subsequent agreements parol are not admissible to vary that contract.

The Court: Perhaps I'm wrong. I thought the purpose of this was to show modification of the contract and a separate agreement to pay for extras, not a part of the contract at all. He's trying to show there was another contract modifying it. [272]

Mr. Olson: That's true.

Mr. Hawkins: And I contend that has to be in writing.

The Court: On what ground?

Mr. Hawkins: On the ground, well, not only does it vary the terms of this written contract, but it is an agreement that is required to be in writing under the statute of frauds.

(Testimony of M. C. Schaefer.)

The Court: Not if it is performed, is it?

Mr. Hawkins: It wasn't performed at this time.

The Court: Well, it probably will be shown later on. It will be overruled. Proceed.

Direct Examination

(Continued)

By Mr. Olson:

Q. Finish relating the conversation, then, Mr. Schaefer. You ended up—can you give the last part there?

(Whereupon, the reporter read the last previous partial answer.)

A. (Continuing): —“that you'll have another shovel on the job, you'll have an engineer on the job, you'll have plenty of lumber, and that we're not going to be required to do any of this excavating; that you're going to have your excavations out a foot and on a 1 to 1 slope, as called for in the specifications”. Then we started walking away from this spot, and Al Hunter and Mr. Macri were walking ahead of Mr. Cohen, Waltie, and I, perhaps [273] 15 or 20 feet, and Mr. Cohen said “Well, Mr. Macri——”

Mr. Holman: I object to that as hearsay, if it was not shown to be in the hearing of Mr. Macri.

The Court: Mr. Cohen was talking to Mr. Macri, as I understand it.

Witness: No, Mr. Cohen was talking to myself.

The Court: Was Mr. Macri there?

(Testimony of M. C. Schaefer.)

Witness: Ahead of us about 15 or 20 feet.

The Court: Not within hearing?

Witness: Well, he and Mr. Hunter were having a conversation at the time.

The Court: Well, I'll have to sustain the objection.

Mr. Olson: Your Honor will have in mind Mr. Cohen was the engineer brought over by Mr. Macri.

The Court: Well, I'll overrule the objection if the conversation was with the engineer.

Witness (Continuing): That's right. Mr. Cohen said "Well, Mr. Macri has indicated or told me that he wants me on this job, and if I am, why, I'll see that this work is done according to specifications". He says "This is no way of doing this kind of work" and he said——

Mr. Holman: Your Honor, I again move that that be stricken as hearsay, so far as Macri is concerned, because it is not a declaration against interest of Macri [274] by anyone who was on this job, in handling this job. In other words, the witness was told that Mr. Cohen came with Mr. Macri from Seattle, and he was to go on this job.

The Court: I think I'll strike this, if it refers to instructions or some statements that were made by Mr. Macri to Cohen, and Cohen is talking about it outside of Macri's presence. The motion to strike will be granted. It is time to recess now. We'll recess until 1:30.

Mr. Holman: May I recall Mr. Reynolds, your Honor?

(Testimony of M. C. Schaefer.)

The Court: All right, we'll get these couple of the witnesses out of the way. Have you any objection, Mr. Olson?

Mr. Olson: No, any way to expedite it. Of course, I want to get through with Mr. Schaefer sometime. I'm agreeable.

G. R. REYNOLDS

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Holman:

Q. Did you list the dates you found, Mr. Reynolds?

A. I believe I have them all but one. I think there is one on the start I couldn't find.

Q. Then I'll ask you if you found entries for the dates of August 16, September 1, 2, 5, 13, 15, 19, 21, 22?

A. Beg your pardon; I had these in order as you had them down, but I see someone has smeared them up again.

Q. Didn't you make a list?

A. No, I just put them down as you had them.

Q. Is that too fast for you?

A. No; let's see, what one did you say first?

Q. August 16; September 1——

A. I have August 31. I start out with——

(Testimony of G. R. Reynolds.)

Q. All right, had you testified—far as you got on testimony was September 1. Do you have September 2?

A. No, I haven't. Maybe that was the one I couldn't find.

Q. The 5th?

A. Wait a minute; I had these in rotation once. They're kind of out of order here.

Q. Well, call what you have, and I'll check them.

A. I think I can put them together in just a second; 9/2; 9/5; 9/22, and August 31, then I think it goes to 9/13. [275]

Q. All right. A. 9/15.

Q. Check. A. 9/19.

Q. Yes. A. 21.

Q. 21. A. 25.

Q. 25. A. 10/18.

Q. 10/18. A. 10/19.

Q. 19. A. 23.

Q. 23. A. 24.

Q. 24. A. 26.

Q. 26. A. 30.

Q. 30. A. 31.

Q. 31. A. 11/1.

Q. 11/1. A. 2; 3. [276]

Q. Check. A. 4.

Q. Check. A. 6; 9.

Q. All right. A. 10.

Q. Yes. A. 11/11.

Q. Yes. A. 13.

(Testimony of G. R. Reynolds.)

- Q. Yes, sir. A. 17.
Q. Yes. A. 22.
Q. Yes. A. 24.
Q. Yes. A. 29.
Q. Yes. A. 12/4.
Q. Yes. A. 12/5.
Q. Yes. A. 6; 12. [277]
Q. 12. A. 15.
Q. Yes. A. 28.
Q. Yes. A. 1/12/45.
Q. Yes. A. 1/16.
Q. Yes. A. 17.
Q. Yes. A. 20.
Q. Yes. A. 22.
Q. Yes. A. 23 and 24.
Q. Yes. A. 26.
Q. Yes. A. Or 25.
Q. Yes. A. And 26; 29.
Q. Yes. A. 2/2.
Q. That's February 2, yes. [278]
A. 1945; 2 and 3.
Q. Yes. A. 6.
Q. Yes. A. And 8.
Q. Very well.

Mr. Holman: I ask that I be given identification for those, and typed copies substituted.

The Court: Yes; I understand that those will all be marked as defendant Macri's identification 13-m.

(Whereupon, Daily inspection reports (Reynolds) were marked defendant Macri's Exhibit No. 13-m for identification.)

(Testimony of G. R. Reynolds.)

Mr. Holman: That is all, Mr. Reynolds.

The Court: Just a moment. Do you have cross-examination?

Mr. Olson: I was just checking with some of them I have marked here.

The Court: Did you get all of the sheets?

Mr. Olson: I think I've got the date of them here, yes. Now, as I understand, are these sheets offered into evidence now?

The Court: No, the offer hasn't been made.

Mr. Holman: Then when they're typed I'll make the offer. [279]

Mr. Olson: You're offering them in their entirety?

Mr. Holman: The sheets as called, yes.

Cross-Examination

By Mr. Olson:

Q. Have you got the sheet for 9/22/44 and 10/18/44 there, Mr. Reynolds? A. 9/22?

Q. Yes.

Mr. Holman: What is the other date?

Q. 10/18. Could I see those two, please? I noticed on the daily report, Mr. Reynolds, under date of 9/22/44, you have the notation "Finished grading ahead of carpenters not done". What is meant by that statement?

A. Finished grading not done ahead of carpenters.

(Testimony of G. R. Reynolds.)

Q. What do you mean by the finished grading, Mr. Reynolds?

A. Well, that's the fine grading for the structures, the finished grading.

Q. Does that finished grading consist of hand excavation? A. Yes, it is.

Q. In other words, the rough hole was made by means of a power shovel?

A. Or some means. I wasn't there when they were made, to be honest with you.

Q. And by this finished grading ahead of carpenters not being done, I take it, then, you mean by that that the floor of the excavation had not been finished to receive [280] the structure?

A. That's right.

Q. And it's a fact that that had to be done before the carpenters could install the panels; then followed by "Two carpenters had to strip forms this afternoon because of tamp back-fill not done"; what does that mean?

A. Sometimes when it is over-dug someplace or other, or the wall has to be tamped in, if the material is too dry they have to haul water and tamp that in; it can't be throwed in loose.

Q. Does that again refer to the floor of the excavation?

A. Well, in some cases it would and some wouldn't.

Q. When you say "dug too deep" I take it you mean the sub-grade against which the concrete

(Testimony of G. R. Reynolds.)

slab was to be laid directly on the dirt was too deep?

A. If it is too deep directly on the floor of the structure it doesn't make too much difference, because it is just a waste of concrete, but that also goes out into the—do you get what I mean?

Q. Let's be sure we get it into the record. Suppose the sub-elevation or the sub-grade on the floor of the structure was too deep?

A. No, if it is too deep it has to be tamped up, or he couldn't get that structure in there; it's got to fit, or something. [281]

Q. If it is down too deep what would they have to do with reference to the placing of the concrete?

Mr. Holman: I object to that as improper cross-examination for the reason that the witness has not been qualified as a structure excavation man.

The Court: Well, he's a concrete inspector.

Mr. Holman: Yes.

The Court: And he should know, I assume, how concrete should be placed in the excavation. This relates to that. I'll overrule the objection.

Mr. Holman: That's all this relates to. If counsel wants to qualify him and base his case on his knowledge as an excavation man, that is his business, but it isn't proper cross-examination.

Mr. Olson: Did your Honor overrule the objection?

The Court: Yes, I overruled the objection.

(Testimony of G. R. Reynolds.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Reynolds, you say it would take more concrete. By that do you mean that they'd just have to fill up the over-excavation with concrete?

A. Yes, if it is the center of the structure they would have to, and that would make an over-run in concrete.

Q. Do you know if the Bureau paid for that over-run?

A. No, they don't pay for the over-run; in a hole like that they wouldn't. [282]

Q. They would not pay for it?

The Court: You'll have to answer aloud so the reporter can hear you.

A. Yes; I mean no; no, they wouldn't pay for it.

Q. The reporter can't get a head-shake or a nod into the record. Now, in other words, the floor of the slab of concrete on the floor of these structures had to be a certain thickness, is that right?

A. That's right.

Q. What thickness was it?

Mr. Holman: The specifications, may it please the Court, are the best evidence.

The Court: Well, I'll overrule it. We could look at the specifications, but it will take too much time.

A. Well, it is always shown right in print on the structure what it calls for. Some are five

(Testimony of G. R. Reynolds.)

inches, practically all, now, but at that time I don't know just what it was, five, six, seven inches.

Q. If it called for five, and the grade was far enough down so that they had to put a foot of concrete in there in order to reach that elevation, that was agreeable with the Bureau?

A. That's right.

Q. Except they didn't pay for the extra concrete. Now, referring to your daily report under date of 10/18/44, it [283] says "Carpenters setting on lateral 63.6. Most of these structures had to be excavated, as sub-grade was left high, and hardpan". What do you mean by that notation?

Mr. Holman: May it please the Court, not wishing to interfere with counsel's cross-examination, I am mindful of your Honor's suggestion that instead of interrogating the witnesses and having it in the record, and then again in by way of offer and admission, that it wasn't necessary to do it twice, what counsel is doing is picking certain of these and reading them into the record. They speak for themselves, your Honor.

The Court: I think he has a right to have the witness explain what he means by certain notations on there. That's what he is doing here. If you wish to call others to the Court's attention you may do so; you can read them to the Court as you go along, after they're offered in evidence.

Mr. Holman: Yes, after they're admitted.

The Court: He has to have his explanation while the witness is here. Proceed.

(Testimony of G. R. Reynolds.)

Mr. Olson: That goes back to my original objection. Reading this is not complete. I was asking the witness to testify to what he knew.

Q. Do you have in mind what I just read, Mr. Reynolds? A. Yes, I have. [284]

Q. What does that refer to? What do you mean by this?

A. If your sub-grade is high it has to be taken down to what it calls for. You can't have thin concrete on the bottom.

Q. And where you say "Carpenters setting on lateral 63.6, most of these structures had to be excavated as sub-grade was high, and hard-pan," who was doing this excavation?

A. You mean who did it?

Q. I mean who was doing it.

A. I don't remember just who did do it.

Q. I don't mean the identity. Was it the carpenters doing the excavation?

A. I don't recall.

Q. What you intended to convey was that the carpenters were at the excavation putting in the panels, and that the sub-elevations were too high and had to be excavated?

A. Had to be taken down.

Q. And that was after the carpenters were right at the hole setting their forms?

A. Probably so.

Mr. Holman: I move that be stricken as speculative. He said "probably". A. Yes.

(Testimony of G. R. Reynolds.)

The Court: I'll let it stand.

Q. That is the fact; that's what you're intending to convey? A. Yes, that's right. [285]

Q. Now, did you, Mr. Reynolds, from time to time, observe the Concrete Construction Company's carpenters doing excavating in the excavations?

Mr. Holman: Objected to, your Honor, as not proper cross-examination under the procedure that we are following now.

The Court: Overruled.

Witness: May I have the question again?

(Whereupon, the reporter read the last previous question.)

A. I don't remember.

Q. Now, Mr. Reynolds, you also inspected the concrete installations on specifications 1068, did you not?

Mr. Holman: Just a minute, I object as improper cross-examination. We're talking about 1062.

A. Yes, I did.

The Court: 1068 wasn't gone into on direct examination, as I understood it.

Mr. Holman: No, your Honor.

The Court: I think it is improper cross-examination. However, I don't see anything to be gained by bringing these witnesses back here again and again. If you wish to make him your own witness you may do so. This is all out of order anyway so far as the defendant is concerned. [286]

(Testimony of G. R. Reynolds.)

Mr. Olson: Do you intend to introduce these sheets on 1068, or not?

Mr. Holman: I intend to introduce everything identified by these various witnesses, yes.

Mr. Olson: None of the sheets you have put in so far relate to 1068, is that right? If they do, it is proper cross-examination.

Mr. Holman: I asked only about 1062.

Mr. Olson: Well, I'll make Mr. Reynolds my witness as far as 1068 is concerned, then.

The Court: All right.

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Reynolds, you also inspected the excavations, or the concrete work, on 1068?

A. Yes, I did.

Q. Now, were the walls, the banks, of the excavations on 1068 excavated to a one to one slope?

A. No, they were vertical.

Q. They were vertical excavations, and is that also true with reference to the excavation on 1062?

A. Yes, they were vertical also.

Q. They were vertical. I understand that your inspection was in the same position as that made by the other inspectors, that you did not make any detailed inspection or take any measurements with reference to the excavations? [287]

A. No, we didn't.

(Testimony of G. R. Reynolds.)

Q. Your function was to inspect the form after it was in place, and to give it your official O. K. prior to the pouring of the concrete?

A. That's right.

Q. And how much trouble, if any, the Concrete Construction Company had in getting those forms in, and to the proper grade, was not a part of your official inspection? A. No, it wasn't.

Q. Now, you did most of the inspecting, as I understand it, Mr. Reynolds, on 1062 and 1068?

A. Yes.

Q. And these other gentlemen came in when you were relieved because you were on some other job, or off the job, or something of that nature?

A. Yes, with the exception of Mr. Moorhead, and he was running the job when I came out; I mean he had the job and I took it from him on the beginning of 1062.

Q. Of 1062? A. Yes.

Q. Were the excavations that were made on 1068 made, in general, the same as on 1062?

A. Near as I could tell, they were.

Q. Now, would you state, Mr. Reynolds, in general, the [288] manner in which the placing of structures and the pouring of concrete took place on 1068? A. On 1068?

Q. How it was handled. A. On 1068?

Q. Yes.

A. The structures were made up as a whole unit and hauled into the field and placed right into the hole, in other words, on 1068, while in 1062

(Testimony of G. R. Reynolds.)

they were made in sections and hauled in and put together in the hole.

Q. Well, how did they get along on 1068? When you came to inspect the structures were they always right for grade?

A. No, they weren't always right.

Q. Amplify that, as to how you did find the structures when you came to give them your official inspection and O. K. for the pouring of concrete.

A. Well, it's a hard question, because they weren't all out, and so forth. Some of them was twisted, had to be brought back at right angles, and some of them was loose back fill in them, where you know it should have been tamped in.

Q. What did you have to do about it, Mr. Reynolds?

A. Well, we had to make them fix them before they could pour; that's the main thing.

Q. And how frequently did that occur on 1068?

A. Well, towards the end of the job it was practically every day.

Q. What was the situation with reference to foremanship and supervision on 1068?

A. Very poor.

Q. Was there any there, Mr. Reynolds?

A. Yes, they had a superintendent, and they had a—do you want to know who was in charge? I didn't get the question.

Q. Well, you can go ahead; who was in charge?

A. Well, Vernstead, a man by the name of Vernstead, was the superintendent. He practically run

(Testimony of G. R. Reynolds.)

everything, far as that's concerned. All orders were ordered out direct by him.

Q. Well, now, you say that the structures on 1068 were not to grade; the back filling, or not the back filling, but the tamping or back fill was loose?

A. That's right.

Q. Is there anything else that was wrong with the structures as you went down the line to O. K. them?

A. Well, I don't remember; that's more or less quite a while ago.

Q. There were, however, quite a number of them that you had to have re-done?

Mr. Holman: Just a minute; object as having already been covered, your Honor. [290]

The Court: Well, it is leading, I think. Probably repetition, too.

Mr. Olson: As I understand the rule, on an expert witness I have a right to ask leading questions, not only on the theory, but the practical standpoint. He knows more about it than I do.

The Court: Well, I think you can ask for opinion evidence, but I don't think the rule was changed as to leading questions.

Mr. Olson: You may examine.

Redirect Examination

By Mr. Holman:

Q. My Reynolds, it was your duty, was it not, to make appropriate memoranda every day on factual matters pertaining to your field work?

A. Anything of any importance.

(Testimony of G. R. Reynolds.)

Q. Yes, sir; anything that you in your judgment as a field inspector found which you felt should be called to the attention of the office, and the superiors through the office, it was your duty to make factual notes, correct? A. That's right.

Q. As to your opinion on things one way or the other, independently of facts, it was not your duty, was it?

A. Well, I don't quite get it clear.

Q. Well, I mean if you had some opinion on something as to relative rights between parties, or something like that, [291] that wouldn't be your duty? A. No.

Q. Nor is it a Bureau practice, is it?

A. It is not a Bureau practice to interfere.

Q. No, sir; that's all. Oh, one thing more. That earth out there in which the excavations were being made in 1062 and 1068 was of what type of material principally? A. On 1068?

Q. Just describe the material.

A. I don't just remember. I think it is kind of a sandy loam.

Q. Sandy loam? A. I don't just recall.

Q. You don't recall?

A. No, I don't just recall.

Cross-Examination

By Mr. Hawkins:

Q. What do you mean by back fill, Mr. Reynolds?

A. Oh, tamp back fill, you mean around structures, or in structures? Well, sometimes it is 'way

(Testimony of G. R. Reynolds.)

over-dug on the size; it has to be back-filled, they call it; it has to be tamped. It can't be throwed in loose.

Q. As I understand, the back fill is filling in up against the wall after taking the forms out.

A. I think most of this case refers to back fill of a structure before it is poured, isn't it? [292]

Q. That is, around the footing, you mean?

A. Well, for instance, if you got a hole that's supposed to be about four feet deep, and it is about six feet deep all the way out, you got to set those structures up on something.

Q. You fill the dirt in to bring it up to the required level?

A. And tamp it. It can't be all throwed in at once. There has to be special pains taken there.

Q. You're not talking about throwing dirt against the wall?

A. No, that comes after a different heading; some does and some doesn't.

Mr. Hawkins: That's all.

Redirect Examination

By Mr. Holman:

Q. I would like to ask a question on that. The specifications require tamping in not to exceed six-inch layers, does it not?

A. Not to exceed six-inch layers; I believe that's what they say.

Q. In other words, you put in a layer and tamp that down, and put another layer——

A. Wet it.

(Testimony of G. R. Reynolds.)

Q. That's something that's done right along in structure excavation? A. Yes. [293]

Q. Usual practice? A. Usual practice.

Q. As well as a Bureau requirement?

A. Well, I wouldn't say as to that, because the Bureau is about the only one I ever worked for.

Q. I say, as a Bureau requirement?

A. Yes.

Recross-Examination

By Mr. Olson:

Q. Mr. Reynolds, that back filling and tamping, if you had two feet off grade, and you had to tamp and back fill six inches at a time, how long would it take to do that and let it set between layers?

A. It all depends on how dry it is. You may have to haul water to put that in. If it is dry it won't pack. The drier it is the more water it takes.

Q. Well, if the carpenters arrived at an excavation where the sub-grade was two feet low, and this back filling had to be done, could it be done while they were putting the panels there into place?

A. Well, it all depends on what part of the structure it was in. If it was in the back of the structure they could probably put the head wall in ahead, but as a general practice they back filled before they ever put those structures in.

Q. The general practice is that your tamping and back [294] filling, as far as the sub-grade, is done before they put in the structure?

A. As a rule, yes.

(Testimony of G. R. Reynolds.)

Q. And in some instances would that require cribbing in order to make the back fill?

A. Well, if they had to trim there wouldn't be any back fill there. If they had to cut out they would be cutting back to natural earth; is that what you mean?

Q. Well, what I'm referring to, Mr. Reynolds, some of these excavations contained several structures, didn't they? A. That's right.

Q. And the sub-grade on one of those structures would be at a different elevation than the sub-grade on another structure in the same hole?

A. That's right.

So that if all the sub-grades were down to the same elevation, and you had to raise the sub-grade on one of the structures and not on another, would it require some cribbing in order to do that?

A. Yes, they would have to trim out, I should think; let's see, just how would they do that? There's quite a mess of them in one hole.

Q. Yes, there were several.

A. If it was low—you're talking about back fill now; if it is too low you could pour the concrete into that [295] bottom, couldn't you, and let it come up around. You may have to wait an hour or two for some of it to set up before you could go along with the next one, but that case doesn't very often occur.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Hawkins: One further question.

(Testimony of G. R. Reynolds.)

Recross-Examination

By Mr. Hawkins:

Q. This soil out there was so dry that it had to be tamped and wet with water?

A. Well, let's see, I went out there, I don't just recall, in August; most of it was too dry to throw in loose; certain kinds of weather you don't have to haul water; that's the best time to do your back filling.

Q. Well, how can you maintain a vertical cut if soil is as loose as that?

A. How can you maintain what?

Q. Maintain a vertical cut; you said it was all vertical excavations, if this soil was as loose as that?

A. I didn't say it was loose; it was dry.

Q. It is sandy loam? A. Not necessarily.

Q. Oh, I understood you said it was.

A. Well, I said some was down six feet; I didn't classify the soils down there; we wasn't interested in it, as we [296] told the court before.

Q. If it were sandy loam you couldn't maintain a vertical cut very well, could you?

A. I wouldn't say without trying it.

Redirect Examination

By Mr. Holman:

Q. You have not worked in construction yourself as an operator at any time, have you, Mr. Reynolds? A. No, just an inspector.

(Testimony of G. R. Reynolds.)

Mr. Holman: That's all.

Mr. Olson: That's all.

The Court: That's all, then.

(Whereupon, there being no further questions, the witness was excused.)

J. A. COSTELLO

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name is J. A. Costello?

A. Yes, sir.

Q. And you reside at Sunnyside?

A. Yes, sir.

Q. And you were subpoenaed to attend at this trial?

A. Yes, sir.

Q. And you have, as arranged before the luncheon recess, gone over your daily reports which were made with respect to specification 1062-1, have you?

A. Yes, sir.

Q. Will you tell me whether or not from those—those are the official reports that you made, they are signed by you, are they not?

A. These are what is termed as a daily report..

Q. Yes, the daily report.

A. Yes, sir.

(Testimony of J. A. Costello.)

Q. That you made and signed; you were relief man in there were you not, between Mr. Reynolds and Mr. Sektnan?

A. No, sir, I was relief man for Mr. Reynolds only.

Q. Will you tell me whether or not you found entries for October 6, 1944?

A. Yes, I have it here.

Q. October 10, 1944? A. Yes.

Q. October 12, 1944? A. Yes.

Q. October 13, 1944? A. Yes, sir.

Q. And January 2, 1945?

A. I didn't locate that.

Mr. Holman: All right, sir, that's all. How will these be marked, Mr. Clerk?

The Clerk: They will be 13-n.

(Whereupon, Daily inspection [298] reports (Costello) were marked defendant Macri's Exhibit No. 13-n for identification.)

Mr. Olson: Is that all?

Mr. Holman: That's all.

Mr. Olson: I would like to make Mr. Costello my witness, then, your Honor.

The Court: All right.

Cross-Examination

By Mr. Olson:

Q. Mr. Costello, you were a field inspector on the job, 1062? A. For a period of time.

(Testimony of J. A. Costello.)

Q. Part of the time, as relief field inspector, I should say? A. Yes, sir.

Q. Now, in connection with that work you went out on the field and inspected a structure, did you, for pouring of concrete? A. Yes, sir.

Q. Just explain to the court what your inspection consisted of.

Mr. Holman: Just a minute; may I have the period that he worked?

Mr. Olson: Well, I take it you've got it here.

Mr. Holman: The same period, you're talking about, that he testified about? [299]

Q. Is that right, Mr. Costello?

A. The period from the 6th to the 13th of October.

Mr. Holman: One week?

A. Approximately.

Q. All right. Now what did your inspection consist of? What did you have to do when you went out and inspected a structure; just briefly?

A. Well, the setting of forms, the pouring of concrete, the stripping, the curing, the placing of hardware, such as weirs, see they're to grade, hydraulically in line.

Q. Now, what was the situation with reference to the bank of the excavation around the structure? Was it to a one to one slope, or not?

A. Well, I'd have to go back and tell you about that one to one slope you're asking for. This hoe that went down through had, as I recall, dug those structures several months before we were on the

(Testimony of J. A. Costello.)

job, and they dug them vertically at that time, but that's not entered in here.

Q. What I'm getting at is the bank was excavated vertically?

A. Yes, the hoe motion was vertical.

Q. Now, did you in this period of time you were inspecting have an opportunity to observe the carpenters of the Concrete Construction Company working on the installation of panels?

Mr. Holman: Just a minute. Your, Honor, if [300] counsel makes this witness his witness I have no objection, but that is not proper cross-examination.

The Court: He's already made him his witness.

Mr. Holman: I beg your pardon; and is this on 1068?

Mr. Olson. 1062.

A. Well, as the duties of an inspector, the concrete inspector takes over when the forms arrive, or when they start placing them in, and the carpenters usually set up their string lines from these elevation stakes and set their forms. Well, were's not interested as far as the sub-contractor or the contractor is concerned, whose job it is to fix the sub-grade, but when the sub-grade doesn't match with the form, why, it's got to be remedied, and then's when we ask for it to be done.

Q. Now, getting back to my question, did you observe——

A. Yes.

(Testimony of J. A. Costello.)

Q. The carpenters of the Concrete Construction Company doing excavating as they were putting in these forms, in order to get them to the right grade?

A. Well, I called attention to Mr. Darcy one day regarding it, the first day I was on the job, and he came out in the morning about nine o'clock, that I had found two structures that wasn't right, and they would have to be taken care of; it wasn't our problem who done it. Darcy [301] said he had a lot of that to do, but he would take care of it before I gave the O.K. on the structure.

Q. What I'm getting at, did you actually see and observe the carpenters—— A. Yes.

Q. ——having to do excavating work?

A. Yes, they was using a shovel.

Q. And what type of excavating work was that they were doing?

A. Well, the excavation was the type of work for what you'd call sub-grade.

Q. And would that be preparing the floor of the excavation—— A. That's right.

Q. ——to the proper elevation?

A. Yes, that's right.

Q. And state whether or not that is work that has to be done preliminary to installation of the structure?

A. Well, if they don't do it, they don't have good luck in putting their structure in on proper elevation.

(Testimony of J. A. Costello.)

Q. And if the structure isn't in on proper elevation, will you permit them to pour concrete?

A. No, after they get the structure completed we check it for elevation, and all those measurements. If it is not right, then of course we know it, and call their attention to it, and we don't O.K. it until they remedy it. [302]

Q. If it is the wrong elevation you make them do it over?

A. That's right; have to change it.

Q. Mr. Costello, did you observe anything about the Concrete Construction Company's carpenters doing excavation for sub-wall trenches?

A. Well, as I recall, what short time I was down there, there was once or twice that they had to dig a wall in order to put their form in. As I recall it was pretty low in the lateral, down towards the highway.

Q. How about the clearance that existed between the bank and the outside form of the structure?

A. Well, these particular ones, as I recall it it was the back end of the structure; in order for them to get down and put what is known as their she-bolts and their walers, it was so close they couldn't do it, they had to dig it out so they could put their she-bolts in.

Q. The carpenters had to dig it out?

A. Yes, they done that.

(Testimony of J. A. Costello.)

Redirect Examination

By Mr. Holman:

Q. Mr. Costello, your instructions from the Bureau were to deal with the principal contractor, were they not? A. Sir?

Q. Your instructions from the Bureau of Reclamation was to deal with the principal contractor; in other words, if anything was found wrong, you were to tell the principal [303] contractor? I'm talking about any official order would go from the Bureau of Macri and Company, wouldn't it?

A. No; you see, we was informed that Concrete Construction Company had the job of pouring the structures, and that's naturally who we listened to.

Q. And you gave them instructions direct?

A. That's right.

Q. Now, the thing I would like to know is whether or not in the week you were there, from October 6 to October 13, you had any such occasion?

A. To deliver instructions to the main contractor?

Q. Yes, sir; or to the sub-contractor.

A. Well, yes, I did talk to the sub-contractor. Mr. Darcy is their representative.

Q. You made no note of that, did you?

A. On my forms?

Q. Yes, sir. A. No, I don't think so.

(Testimony of J. A. Costello.)

Q. You made no report to your superior about that?

A. No, I was only there temporarily, Mr. Holman.

Q. I understood that, just temporarily.

The Court: Any further questions?

Cross-Examination

By Mr. Hawkins:

Q. What about the soil out there, is that sandy? It's volcanic ash, isn't it? [304]

A. Well, the origin of the soil is——

Mr. Olson: That's objected to on the ground that if it is cross-examination, that no one has gone into it, either Mr. Holman or myself, about the type of soil.

The Court: It is overruled. It has to do with the slope there.

Mr. Olson: I'll withdraw it.

A. Well, as far as a soil chemist, I'm not.

Q. So it is a volcanic ash?

A. So to get a technical answer you would have to ask him.

Q. I'm not asking about the agricultural properties. I'm asking whether or not it will hold a vertical slope; it is a sand?

A. Yes, I've seen places where they run a pipe line two foot deep, and six foot deep, and the ditch standing right there, in a sandy loam.

Q. On this job?

A. Yes, on this particular job.

(Testimony of J. A. Costello.)

Redirect Examination

By Mr. Holman:

Q. Well, it was the usual hoe excavation?

Mr. Olson: That's objected to——

A. That's right, it is a hoe——

Mr. Olson: Just a moment, that's objected to, as whether or not it was the usual hoe excavation. You [305] say hoe type of excavation?

A. Hoe type of excavation.

Mr. Olson: Immaterial, incompetent, irrelevant, what is usual. What we're dealing with is the specifications call for a certain type of excavation.

The Court: I'll let him answer.

A. You ask me was it done with a hoe?

Q. Was it the usual type of hoe excavation?

A. Well, as I recall it, that's what they had down there, was a hoe excavation.

Q. And was it the usual type of hoe excavation?

A. Yes.

Mr. Holman: All right, that's all.

(Whereupon, there being no further questions, the witness was excused.)

MARVIN SEKTNAN

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name, please, is what?

A. Marvin Sektnan.

(Testimony of Marvin Sektnan.)

Q. Yes, Mr. Sektnan. And you are an engineer with the Bureau of Reclamation?

A. Yes, sir.

Q. And you are now in the operation and maintenance division, [306] are you not?

A. Yes, sir.

Q. You were a resident engineer, were you, on specification 1062 for the Bureau?

A. Yes, sir, part of the time.

Q. And when did you take over there? Do you recall, about?

A. About the middle of November, 1944.

Q. And you held about when?

A. Until the completion of the job.

Q. I didn't hear you.

A. Until the completion of the job.

Q. Oh, yes; and during that time did you take over inspection of concrete for some period?

A. Yes, sir.

Q. When was that, about?

A. February, about the 8th or 9th.

Q. And then you continued inspection until the end of the job? A. Yes, sir.

Q. I should say inspection of concrete.

A. Yes, sir.

Q. The excavations were not checked in the field, were they, Mr. Sektnan? A. No, sir.

Q. Did you check identification 13 your reports as [307] submitted by you, signed by you?

A. Yes, sir; they're included in that group. I didn't separate those you had listed, but they're

(Testimony of Marvin Sektnan.)

all in that one package. I found the ones you had listed.

Q. Can you tell me whether or not, then, you did by a report for February 9, 1945—

Clerk: As I understand, he hasn't segregated the ones that are listed from the rest of them.

A. They are in numerical order and date, but they're not separated.

Q. Will you just check the dates, then? February 9th? A. 9th.

Q. February 14, 1945?

The Clerk: Just a minute; if I'm going to have to segregate this I'll have to take the dates too. A. Yes, sir.

Q. February 16? A. Yes, sir.

Q. February 17? A. Yes, sir.

Q. February 19? A. Yes, sir.

Q. February 28? A. Yes, sir.

Q. March 1, 1945? [308]

A. Yes, sir.

Q. March 2, 1945? A. Yes, sir.

Q. March 3?

A. Yes, sir; this one of March 2 is signed my name by one of the men working under me.

Q. Oh, then you can't testify to that as of your own knowledge? A. No, sir.

Q. I'll eliminate that one, your Honor; March 3 you said yes? A. Yes, sir.

Q. And March 30? A. Yes, sir.

(Testimony of Marvin Sektnan.)

Mr. Holman: Those are the ones, your Honor, that I have marked defendant's 13-o.

(Whereupon, Daily inspection reports (Sektnan) were marked defendant Macri's Exhibit No. 13-o for identification.)

Mr. Holman: That's all, your Honor.

The Court: Yes; proceed with the cross-examination.

Mr. Olson: May I just glance at a couple of these, your Honor, here, and I just don't know what is in here; I'll look at a couple of them, and then let him go, and if I find something later on, we can call the witness back. [309]

The Court: All right.

Cross-Examination

By Mr. Olson:

Q. Mr. Sektnan, I notice here on looking at your report for March 3, 1945, a notation, "Carpenters working on forms at stilling pool and preparing to move chute forms; did not move forms and Cohen did not have finishers to prepare sacks for spraying." Now, what do you mean there, "did not have finishers to prepare sacks for spraying"?

A. Well, finishing the concrete.

Q. That refers to concrete?

A. After the forms are stripped, yes, sir.

Q. That does not refer to any part of excavation, then?

A. No, sir.

(Testimony of Marvin Sektnan.)

Q. Did you notice on that stilling pool out there—or were you there during the carpenters' installation of forms?

A. At times, yes; most of the time.

Q. And did you observe the fine graders or excavators working in the hole at the same time the carpenters were working?

A. There was fine grading going on at the same time. I don't know whose men they were.

Q. But there was fine grading being done in this pool at the same time the carpenters were putting in their forms? A. Yes, sir.

Q. Whether or not it was Macri's or Schaefer's men you don't know? [310]

A. I don't know.

Q. And that was right near the end of the job, wasn't it?

A. That was near the end of the job, yes.

Q. So right up to the end of the job the excavation or fine grading was being done right up to the carpenters?

Mr. Holman: I object to that question as argumentative and not supported by the evidence in the case; not proper cross-examination.

The Court: Overruled.

A. Yes, there was fine grading going on at the same time the forms were being set, at that time.

Mr. Olson. That's all.

(Testimony of Marvin Sektnan.)

Redirect Examination

By Mr. Holman:

Q. That is not unusual in structure excavation, is it? A. No, I wouldn't say it was.

Mr. Holman: That's all.

The Court: Any further questions?

(Whereupon, there being no further questions, the witness was excused.)

The Court: Does that conclude your Reclamation Bureau witnesses?

Mr. Holman: That does, your Honor.

The Court: I don't know just what your plans are with reference to offer of these exhibits. It just occurs to me, however, if there is some objection made [311] when they offered, it might be advantageous to have the witnesses here, if it is something that could be met by their testimony.

Mr. Holman: May it please the Court, I have requested the clerk to make copies of these various ones. As soon as they are done then I'll make the offer.

Mr. Olson: Counsel can offer them with the right to substitute copies.

The Court: Yes, you can offer them with that understanding.

Mr. Holman: Well, I do offer these that have been covered by the witnesses and marked especially by the Clerk.

The Court: That is all I refer to.

Mr. Holman: As defendant Macri's exhibits.

The Court: Let's see, now, let's have the record straight on that.

The Clerk: Macri's 13-a to 13-o inclusive.

The Court: What you're offering, then, these daily reports, would be Macri's identifications 13-a to 13-o, inclusive, is that right?

Mr. Holman: That is correct.

The Court: Do you have objection?

Mr. Olson: Yes, your Honor, we object to their introduction on the ground that they're immaterial, [312] incompetent, irrelevant, not the best evidence; they simply constitute written reports made by field inspectors to the Bureau of Reclamation, neither of whom are parties to this contract, and they have no evidentiary value as far as proving what was done and what the situation was on the project as it progressed.

The Court: The objection will be overruled and the identifications admitted, with the understanding that when copies are prepared by the Clerk they will be substituted for the originals, and the originals withdrawn.

Mr. Holman: Would that be originals withdrawn, or returned?

The Court: They may be returned to the Bureau of Reclamation.

(Whereupon, defendant Macri's Exhibits No. 13-a to 13-o, inclusive, for identification, were admitted in evidence.) [313]

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, you had just finished as we adjourned at noon relating a conversation between you and Mr. Macri and others on June 15, 1944. Now, on that date did you observe whether or not there were any form panels at your yard ready for installation in excavations?

A. Yes, there were.

Q. Can you tell approximately how many?

A. Well, at that time there had been prepared enough forms for about 72 to 76 structures. [314]

Q. And were there at that time any finished excavations that were ready for the receiving and placing of those form panels?

A. There were not.

Q. Now, following this conversation on June 15, did you bring your carpenters back on the job for the purpose of installing structures?

Mr. Holman: May it please the Court, I object to counsel's practice of continually asking leading questions that can be answered by yes or no. I think this witness should tell what was done.

Mr. Olson: Well, it is a preliminary question.

The Court: Well, it is leading. I'll sustain the objection.

(Testimony of M. C. Schaefer.)

Q. All right; what did you do, then, next, Mr. Schaefer, with reference to 1062? I don't care what you did down on the job in Portland.

A. There was no excavation ready to receive forms——

Mr. Holman: I move that be stricken as not responsive. He's asked what he did.

The Court: Well, he's explaining. I'll overrule the objection.

A. (Continuing): ——until June 29. On June 29 I had our superintendent on that job go back with another man to get re-started on the job. [315]

Q. Now, just relate in a general way, Mr. Schaefer, what was the condition of the excavations that Mr. Macri furnished you from then on to the completion of the job?

A. Well, there was demand at that time by Macri Company that we get back on the job. Though the excavations were the same general type, they did have a few of the holes fine——

Mr. Hawkins: Just a moment. He said there was a demand by Macri and Company that they get back on the job. Was that by letter or oral conversation? A. That was by 'phone call.

Mr. Hawkins: From whom?

A. That was by Macri's superintendent, Ashley, at that time.

Mr. Hawkins: Ashley? A. That's right.

Mr. Hawkins: And when was that telephone call made?

A. Well, let's see, there was——there had been a call about the 22nd, I believe.

(Testimony of M. C. Schaefer.)

Q. (By Mr. Olson): Of June?

A. Of June.

The Court: Now, let's get back to the direct examination, and the witness will try to answer the questions, and when we get through with direct we'll have the cross-examination.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, what did this 'phone conversation with Mr. Macri, what did they say?

A. That is as to Ashley's request?

Q. Yes, I should have said Mr. Ashley.

A. Well, Ashley informed me that they had a certain number of excavations ready, and for us to get back.

Q. All right.

A. And then on the 23rd of June, I'm quite sure it was that, Fred Waltie and I drove back to Sunnyside to check up on conditions, and there had been at that time a number of excavations, the fine grading still wasn't proper, so we didn't go back until June 29.

Q. All right; now I'll ask you again, then, Mr. Schaefer, to not take each one of these 550 structures, but what was the general type of excavation, including the finished grading, that was furnished you by Macri and Company from then on throughout the job?

(Testimony of M. C. Schaefer.)

A. There was still the same fault; there was very little improvement. The excavations were still vertical right on through the balance of the job; there wasn't enough clearance to get the whalers and she-bolts in; still had to do the excavating to place she-bolts or to place the whalers; we still had to do fine grading and some back filling and excavating and sub-wall trenches; we still placed the first pipe into the structure, which wasn't [317] part of our work; I believe we still did some cribbing for them.

Q. Well, now, as this thing progressed, then, did you later retain counsel? A. Yes.

Q. And who did you retain?

Mr. Holman: Just one minute. Ahead of that, your Honor, may I ask a question for the purpose of the record?

The Court: All right.

Mr. Holman: Did you send written notice within five days after discovering this in June?

Mr. Olson: I object to that as being improper of counsel to take that up at this time. He can go into that.

The Court: I think we had better reserve that for cross-examination.

Mr. Olson: I may have all that covered by the time he gets to it anyhow.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, who did you retain?

A. Mr. McKelvey, of Skeel, McKelvey, Henke, Evanson, and Uhlman, of Seattle, I believe that's the full firm name.

Q. Now, do you remember about when it was that you first retained that firm?

A. I believe that was the last part of October.

Q. And thereafter? [318]

The Court: That's 1945, I presume?

Q. What year was that?

A. That was 1944.

Q. That is during the progress of the job. Now, at that time had Mr. Macri retained counsel, or was he represented by counsel, if you know?

A. Yes.

Q. And who was that? A. Mr. Holman.

Q. (By Mr. Olson): Now, counsel, do you have a letter dated November 13, 1944?

M. Holman: I have the letters you demanded, Mr. Olson, except the one letter that I told you about.

Mr. Olson: Well, this letter of November 13, 1944 I think you have, written by Concrete Construction Company to Macri Company.

Mr. Holman: It is what date?

Mr. Olson: November 13, 1944.

(Testimony of M. C. Schaefer.)

Mr. Holman: Yes, sir, sent registered mail.

(Whereupon, letter Schaefer to Macri dated November 13, 1944, was marked Plaintiff's Exhibit No. 27 for identification.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, showing you plaintiff's identification 27, I'll ask you if that is the original of a letter sent by [319] registered mail to Macri and Company, together with the envelope in which it was mailed? A. It is.

Mr. Olson: We offer this plaintiff's identification 27 in evidence.

Mr. Holman: I object to it as a self-serving document, your Honor, unless and until all of the correspondence surrounding this instrument is also offered to show a complete transaction upon correspondence.

Mr. Olson: Of course your Honor doesn't know what's in it.

Mr. Hawkins: I further object on the ground it hasn't been submitted to me for examination.

Mr. Olson: That a good objection, counsel. I beg your pardon. Do you have the December 1 letter now?

Mr. Holman: Yes, sir.

Mr. Olson: Do you have the exhibit that was attached?

(Testimony of M. C. Schaefer.)

Mr. Holman: There was none attached that I know of. If you will show me the exhibit I can tell you whether I had it or not. What exhibit is attached?

Mr. Olson: Maybe it wasn't in there. Would you mark this for identification, please?

(Whereupon, letter Olson to Macri dated December 1, 1945, was marked plaintiff's Exhibit No. 28 for identification.) [320]

Q. Now, Mr. Schaefer, showing you plaintiff's identification 28, will you state whether or not that is a letter written by myself on your behalf to Macri and Company, at your request? A. It is.

The Court: What is the date of that one?

Mr. Olson: December 1, 1945.

Mr. Holman: 1945?

Mr. Olson: Yes. I assume that counsel for Macri and Company will admit receipt of this letter, I having gotten it from you.

Mr. Holman: Well, this is a letter to Macri and Company.

Mr. Olson: You admit that Macri and Company received that letter, do you not?

Mr. Holman: Oh, certainly, anything I produce I received.

Mr. Olson: Obviously Mr. Schaefer can't testify he sent it. I can take the stand and testify I mailed it, I assume.

(Testimony of M. C. Schaefer.)

The Court: He said he received it. It is time for mid-afternoon recess. You can look over those exhibits while you have time.

(Short recess)

(All parties present as before, and the trial was [321] resumed.)

Mr. Olson: Plaintiff Schaefer offers in evidence plaintiff's identification 27.

The Court: I think that was offered before and objected to by Mr. Holman.

Mr. Hawkins: We also object to it, your Honor, for the reason it is purely self-serving on the part of the Concrete Construction Company, and it is not binding on the defendants Goerig and Philp, not addressed to them, there is no testimony it was ever brought to their knowledge or attention, and furthermore, counsel advises me, according to his previous objection, that this is just one letter of a series of letters that transpired, and all of the correspondence should be offered.

The Court: Objection will be overruled. It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 27 for identification was admitted in evidence.)

Mr. Olson: Plaintiff now offers in evidence plaintiff's identification number 28.

Mr. Holman: The same objection, your Honor.

Mr. Hawkins: The same objection, your Honor. It certainly cannot be binding on defendants Goerig and Philp, not addressed to them.

(Testimony of M. C. Schaefer.)

The Court: Well, of course, if a document is [322] admissible as to any defendant or any party, I have to admit it here, and then decide the effect of it afterwards. This last was after the completion of the contract?

Mr. Olson: Yes, your Honor.

The Court: What is your purpose in making this offer?

Mr. Olson: Showing our demand for payment.

The Court: Well, I'll overrule the objection and admit it for that purpose.

Mr. Olson: There is some reference in there to arbitration, which is wholly immaterial in view of the waiver.

(Whereupon, Plaintiff's Exhibit No. 28 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, you have spoken about the lumber. Did you yourself take a sample of the form lumber that was furnished you on this job?

A. I did.

Q. And do you have that here in Court?

A. Yes.

Q. Both of these packages?

A. That's right.

Mr. Olson: We'll have to unwrap this, I assume, [323] unless you've got something there with a string on it.

(Testimony of M. C. Schaefer.)

The Court: It will have to be unwrapped at some stage if it is to be of any benefit to the trial Court.

Mr. Olson: I was wondering if I might ask my witness off the record if there is any reason why this can't go in together.

Witness: Yes, it can go in together.

(Whereupon, seven pieces of lumber were marked Plaintiff's Exhibit No. 29 for identification.)

The Court: There hasn't been any showing as to where this was procured, or the time.

Mr. Olson: No, there hasn't. I can do that now.

Direct Examination

(Continued)

By Mr. Olson:

Q. When did you get this lumber, Mr. Schaefer?

A. That was on September 22.

Q. And where did you take it from?

A. At the yard, at the job.

Mr. Hawkins: That was in 1944?

Q. That's correct. Showing you plaintiff's identification 29, Mr. Schaefer, I'll ask you if this is the lumber to which you have——

Mr. Holman: Just one number, for the purpose of the record?

The Court: That's identification 29. [324]

Mr. Olson: Consisting of seven pieces of lumber.

(Testimony of M. C. Schaefer.)

Mr. Holman: Your Honor, may the clerk mark each piece of that lumber, so that there is no question what he is talking about?

The Court: What is your reason for wanting it marked separately?

Mr. Holman. Because there's seven distinct pieces of lumber, and without distinction, I don't know how we're going to get it to show in the record. If the exhibit number could be on each piece—I'll withdraw that, your Honor.

The Court: Well, it can be kept together, the same as your inspection sheets. They are all numbered the same number. We can keep it tied together. I think there will be no difficulty about that.

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, then, referring to plaintiff's identification number 29, Mr. Schaefer, is this the lumber which you have just described as having obtained on September 22, I think you said, 1944?

A. It is.

Q. And who furnished this lumber on the job?

A. Macri Company.

Q. Now, just explain to the Court what this particular lumber or specification of lumber is; in other words, did you [325] pick up the worst lumber you could find down there, or what does it represent?

(Testimony of M. C. Schaefer.)

Mr. Holman: Just a minute, your Honor, I object to that as a self-serving statement. He's produced this, and that is what will go into evidence. We were not there to help make the selection.

The Court: I'll sustain the objection as to the form. You can ask him how he selected it.

Q. How did you select this lumber, Mr. Schaefer?

A. Well, I wouldn't just say that I backed up to it to pick it up, but I have pictures that will identify it.

The Court: Just answer the question.

Q. How did you pick it, Mr. Schaefer? In other words, what I'm getting at is are you telling the Court all of this lumber was of this particular type?

A. No, I'm not saying that. There is lumber that is of the worst that was delivered to the job, and at that late a date in the performance of the work; instead of just having the "pond dry" so to say, lumber, as we had it from the start and through quite a bit of the job, it got down to this point. Now, there is just about as bad as anybody could hope to see anywhere.

Mr. Holman: I move that he be stricken as volunteered, and not responsive to the question.

The Court: Yes, that can be stricken. [326]

Mr. Holman: It is pure salesmanship.

Mr. Olson: Poor salesmanship?

Mr. Holman: Pure.

Mr. Olson: That's what was confusing me.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, had this lumber—I notice some concrete, or perhaps I had better ask you what are these?

A. That is concrete. That there lumber with the notches and the concrete on it had been used on construction before, and I'm quite sure that some of the other lumber there had been used on construction, that doesn't show concrete on it.

Q. Now, what I'm trying to get at, was this taken after you had used it? A. No.

Q. Or is this lumber taken as it was delivered to you on the job?

A. That is lumber as was delivered on the job.

Q. And how large a quantity of this type of lumber was delivered to you there?

A. Well, on that I couldn't state. I believe that there was five thousand feet in that load.

Q. Well, you say "in that load." Tell the Court what you mean.

A. Whether it was delivered in one load or two loads I wouldn't [327] be able to say that, but I believe there was about five thousand feet delivered.

Q. Well, is this lumber representative of that particular delivery, whether it was one load or two loads? A. I'd say yes.

Q. We offer this in evidence, if the Court please, plaintiff's identification 29.

(Testimony of M. C. Schaefer.)

Mr. Holman: We would like the privilege of cross-examining the witness before it is acted upon, your Honor.

The Court: All right.

Mr. Olson: Can they do that right now?

The Court: If you want to ask him on voir dire, go ahead.

Mr. Holman: Well, I like to inspect the boards awhile, and something else—I don't know.

The Court: Well, I think he's entitled to make the offers of his exhibits as he goes along. If you're not able to make the objection you may inquire.

Mr. Holman: I object to the introduction at this time as not having been submitted for the purpose of inspection, the opposing party being deprived of any opportunity to cross-examine.

The Court: I am now giving you the opportunity to cross-examine, and if you wish, to examine them and look at them. [328]

Mr. Holman: I mean with respect to where these came from, or when.

The Court: Didn't you make the statement that cross-examination was denied you?

Mr. Holman: Oh, no.

The Court: I understood you to say that. If you want to inspect them, look at them now. Will you read that?

(Whereupon, the reporter read Mr. Holman's last objection.) (Commencing at line 19, page 84 of this transcript.)

(Testimony of M. C. Schaefer.)

The Court: That's pretty plain English.

Mr. Holman: I mean cross-examine after inspection.

The Court: All right, if you want to inspect them, you can inspect them right now. Untie them for that purpose if you wish. Now, you may have the right to cross-examine, as I told you before, if you wish, on voir dire.

Voir Dire Examination

By Mr. Holman:

Q. Can you tell me who delivered those?

A. I didn't see the lumber delivered.

Mr. Holman: I move, then, that that portion of the witness' testimony with respect to the time of delivery be stricken as based upon hearsay. [329]

The Court: The motion will be denied.

Voir Dire Examination

(Continued)

By Mr. Holman:

Q. Can you tell me where they delivered?

A. That there lumber was delivered to the job site, that is, the office site, the yard cite, on job number 1, or on the job specification number 1062.

Q. Now, didn't you say they were delivered on September 22, 1944?

A. No, that was the date on which I snapped some pictures and picked up these.

Q. I'm not interested in your pictures; I'm talking about this lumber.

A. And I picked up these boards.

(Testimony of M. C. Schaefer.)

Q. Do you know when this was delivered?

A. No, I don't; I couldn't tell you the date on that.

Q. And was this piled, or was it lying, or in what condition was it when you secured it?

A. It was dumped off there and was lying criss-cross.

Q. Lying criss-cross where?

A. Near the saw, in the job yard.

Q. Well, Mr. Schaefer, was this stuff cut off from other lumber, is that it? Was this stuff that was cut off?

A. There are some of the pieces there that as I had stated before, that will match out, to make one board. There's one of those boards there now comprising three pieces; I'm [330] quite sure that I cut one of the boards in three.

Q. Oh, you cut them? A. Yes.

Q. For convenience in bringing them here?

A. That's right, for convenience in bringing them in the car.

Q. And how do you know that they were not used before on this job?

A. Well, I know they weren't.

Q. How do you know, please?

A. They would have been made up in a panel of some sort.

Q. Sir?

A. I say, they would have been made up in a panel of some sort.

(Testimony of M. C. Schaefer.)

Q. Yes; and were these boards ever shown to any representative of Macri and Company?

A. Macri and Company men on the job, or superintendent, had plenty of opportunity to see it right there.

Q. Would you answer my question, please? Were these boards that are in identification ever shown to any representative of Macri and Company?

A. No, I didn't take them, deliver them to them to see them. Chances are Mr. Macri himself saw these boards out there on the job.

Mr. Holman: I move that be stricken as volunteered, your Honor. [331]

The Court: It will be stricken, yes. Just answer the questions.

Voir Dire Examination

(Continued)

By Mr. Holman:

Q. Then so far as any submission of these to Macri and Company or his representative at any time before now, that has not been done, has it?

A. No.

Q. Yes. Was any writing identifying these boards written to Macri and Company?

Mr. Olson: That is objected to as being immaterial, if the Court please, whether he wrote Macri a letter about it.

The Court: I'll sustain the objection.

Mr. Holman: I think that is all, your Honor, on cross-examination.

(Testimony of M. C. Schaefer.)

Mr. Olson: We renew our offer, if the Court please.

The Court: The objection is shown of record, I think. Do you wish to add anything to your objection?

Mr. Holman: No, I think that is it, your Honor.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 29 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, I would like to ask you to explain by [332] comparison how you could have performed your form setting, your panel settings into the forms, if the excavation were made with a bank to a 1 to 1 slope, and a lateral clearance at the foot or foundation of the structure out a foot, and the sub-elevation to the proper grade, as compared to how you could perform your work in making these structures in excavations that were tight, as you have described, and not to a 1 to 1 slope, with reference to the performance of your sub-contract.

Mr. Hawkins: Your Honor, I object to that question as obviously leading.

Mr. Holman: I join, your Honor.

Mr. Olson: As being leading?

(Testimony of M. C. Schaefer.)

The Court: He simply asked for a explanation. It is overruled. I don't see that it suggests the answer. He might answer it any way.

A. Had the excavation work been done according to specifications we would have built some of our panels to greater length, which would have afforded us the opportunity to use the panels more readily on the continuous line of structures. We would have then hauled our panels from the yard to the field, assembled them, made up the structure form, poured our concrete, been able to assemble by just merely raising the panel, or taking it into the hole, just raising it in place, putting on the [333] strong-backs, and sliding through the she-bolts and tightening it up, and after the pour, to loosen these she-bolts and use a nail puller to pull the required number of nails, and just loosened the panels away from the concrete, sliding them out of the hole, and having the truck take these panels on to structures ahead. Now, then, if the following structure didn't require certain of these panels from the particular structure, the balance of the panels would have been delivered on to the next hole. As it was we had to take all these panels back to the yard.

Q. Why?

A. Because of the damage done to the forms.

Q. What caused the damage?

A. Further, we would not have been required, or we would have organized our crew so—as an example, had one crew of two men, we'll say, placing forms in single structure holes, two crews, that

(Testimony of M. C. Schaefer.)

was our purpose, two crews designed to set forms in the double structure holes, and one crew to work on triples, then if there were more singles and triples than there were doubles, we would have taken one of the crews that were designed for setting doubles to help set the singles; or the better qualified crew, again the crew working on doubles, to help in setting triple structures, thereby the men would have been accustomed to the type of work, there would have been an [334] incentive, they wouldn't have been feeling dogged, and carpenters are a little different——

Q. Were you able to do that?

A. We were not.

Q. And why weren't you able to do that?

A. Because of the tight excavations.

Q. And how did the tight excavations prevent you from doing that?

A. Because of stripping of the forms; you couldn't get down in some cases to get the she-bolts out. There's some occasion there—there was one particular case, not that I did see but I was told of——

Q. Well, you can't relate what you were told of, Mr. Schaefer. What I want to know is just how your work was affected by what you term a tight excavation, without the 1 to 1.

A. All right; in the stripping of the forms they had to pry the form loose at the top and wedge it apart with two by fours, and in pulling them out of the hole there's just a lot of prying, and you

(Testimony of M. C. Schaefer.)

had to be careful so as not to wreck the concrete in the structure; then after stripping them out of the hole they were damaged to the extent where you couldn't have a field crew just follow along and do the small amount of check-up and see that there were enough of the panels at the holes for the setters as [325] they came along to set their structure, and if there was a board loose, or a minor bit of repair, those fellows would have done it. In this case, however, the forms were damaged to the extent that we had to send them on back to the yard and take care of the repair, and then send them all the way back out to the field, to the next structure ahead.

Q. Now, you also testified that there was not excavations ahead ready for your carpenters to install forms. How did that affect you?

Mr. Holman: Your Honor, I object to that as a leading form of question.

Mr. Olson: I haven't asked the question.

The Court: Well, the Court will remember, or try to, what the testimony is. Go ahead and ask your question.

Q. How did that, Mr. Schaefer, affect your orderly operations there, if at all?

A. Well, it just disrupted the whole works.

Q. Well, now, that doesn't mean too much to the Court, unless you explain how it disrupted it, in what particular, and why.

A. Well, when you put the carpenter into a hole and hand him a shovel, he's got to do a certain

(Testimony of M. C. Schaefer.)

amount of shovel work, and instead of going to the hole and knowing that it is correct, and starting right off by picking up his [336] form panel and start assembling his panels, he was required to check first off and see whether the sub-grades were at a proper elevation, whether he had room enough to get the forms in, and not finding it in that condition, they had to go to structures ahead, and check again, and then in not finding any that was right, they was probably sent back to the yard to tinker around.

Q. Now, explain what, if any effect, the manner of the excavations not being ready, the carpenters having to excavate, affected your pouring of concrete of your concrete pouring crew?

A. Well, instead of having the forms ahead so that we could proceed with the pouring of concrete, and run an average there of twenty yards per day or more, they were just stalled, and the concrete crew had to help strip, and just do about anything around the job in order to keep occupied.

Q. Did you have mobile concrete pouring equipment on the job? A. Yes.

Q. And what equipment did you have?

A. I had a Mixomobile, a Buggymobile, we had a water wagon, and I believe, well, there was two dump trucks, and at times three dump trucks, to haul the aggregate.

Q. How about this Buggymobile, was that new, or old, or used, [337] or what?

A. No, we bought that I believe about the time we started that job.

(Testimony of M. C. Schaefer.)

Q. And how expensive a piece of equipment is that?

A. A Buggymobile I believe was \$1500.00.

Q. Now, this other concrete mixer that you spoke of, what type of piece of equipment is that?

A. That's a Mixomobile; it's a two-yard mixer.

Q. How expensive a piece of equipment is that?

A. What's that?

Q. How expensive a piece of equipment is that?

A. That I believe was \$7000.00.

Q. How much? A. \$7000.00.

Q. \$7000.00; and was that new, or old, or approximately what condition was it in?

A. That was in good condition; that had just been purchased.

Q. That had just been purchased?

A. Yes, that was purchased for this job, and then when we got on to job number 2 I was going to bring up the other Mixomobile that we did have.

Q. Now, were you able to keep that equipment busy and in operation throughout your concrete pouring operations on this job?

A. We were not. [338]

Q. Why?

A. Because there wasn't any concrete to be poured.

Q. Why wasn't there?

A. Because of the forms not being ready.

Q. And why weren't the forms ready?

A. Because the excavations wasn't ready.

(Testimony of M. C. Schaefer.)

Q. Mr. Schaefer, getting down to job 1068, did you or did you not perform 1068?

A. We did not.

Q. Did you receive a letter from Macri and Company directing you to proceed with 1068?

A. I did.

(Whereupon, letter Macri to Schaefer dated November 30, 1944, was marked Plaintiff's Exhibit No. 30 for identification.)

(Whereupon, letter Macri to Schaefer dated January 3, 1945, was marked Plaintiff's Exhibit No. 31 for identification.)

Q. Showing you plaintiff's identification 30, Mr. Schaefer, did you receive that letter?

A. I did.

Q. And showing you plaintiff's identification 31, you also received that letter?

Mr. Holman: What is 31?

Mr. Olson: 31 is your letter of January 3, 1945.

A. I did.

Q. Mr. Schaefer, when you received the letter dated November 30, 1944, being plaintiff's identification 30, the substance of which was to proceed with 1068, what, if anything, did you do with reference to that letter?

A. I called my superintendent.

Q. You called your superintendent?

A. Pat Darcy.

Q. Now, you won't be able to relate a conversation between you. Did you yourself at that time

(Testimony of M. C. Schaefer.)

or some time subsequent go out on the job site of 1068 and make an inspection to see what the conditions were? A. I did.

Q. And when did you go approximately?

A. December 16 or 17.

Q. Around December 16 or 17?

A. I believe that's it.

Q. At that time, Mr. Schaefer, what did you see on job 1068?

A. Well, I saw a few excavations, I believe, at that time.

Q. Would you describe them?

A. They were rough. There had been no fine grading.

Q. Were they completed so that—to a bank with a slope of 1 to 1?

A. They were just dug, just a hole in the ground, that was all there was. There was no fine grading at all. [340]

Q. Had there been any hand excavation done?

A. There had not.

Q. Were they then ready or completed so that the panels could be completed or installed in them?

A. No.

Mr. Olson: If counsel is through examining these, we offer in evidence plaintiff's identification 30.

Mr. Holman: No objection, your Honor.

Mr. Hawkins: No objection.

The Court: Admitted.

Mr. Olson: We also offer in evidence plaintiff's identification 31.

(Testimony of M. C. Schaefer.)

Mr. Holman: No objection.

Mr. Hawkins: No objection.

The Court: Admitted.

Mr. Olson: I haven't heard the bonding company say anything. I assume you have no objection, Mr. Ivy?

Mr. Ivy: I haven't seen them.

Mr. Olson: I thought you were given an opportunity to examine them.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, did you again go out on the job site before receiving the letter of January 3, 1945, being plaintiff's identification 31, if you remember; I mean you personally? [341]

A. Before I received the letter of January 3?

Q. January 3, 1945, the letter which in effect says that you were in default.

A. I believe not.

Q. You did not?

A. I believe not.

Mr. Olson: We renew our offer, your Honor. I understand the bonding company has no objection.

The Court: They will be admitted, both 30 and 31.

(Whereupon, Plaintiff's Exhibit No. 30 for identification was admitted in evidence.)

(Whereupon, Plaintiff's Exhibit No. 31 for identification was admitted in evidence.)

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. After you received the letter of January 3, 1945, being plaintiff's Exhibit 31, did you go at that date or some date subsequent, go out and inspect the conditions on the site at job 1068?

A. I again called my superintendent on the job.

Q. And did you then later——

A. That's immediately on receiving that letter.

Q. You called your superintendent?

A. And then after that, on January 21, I went over to the job number 2, or 1068.

Q. And what did you observe then with reference to excavations? [342]

A. I saw excavations there, and——

Q. Well, describe the excavations that you saw.

A. There were no excavations ready to receive our forms.

Q. Were there any excavations—excuse me.

A. I wouldn't say, I don't believe there was any hand excavating done at that time.

Mr. Holman: I move that be stricken as the witness' belief, your Honor.

Mr. Olson: He's giving his best recollection.

The Court: Well, I'll grant the motion to strike. He doesn't seem to know one way or the other. What is this date?

Mr. Olson: January 21, 1945.

Mr. Holman: 22nd, I thought.

(Testimony of M. C. Schaefer.)

Mr. Olson: What was it?

Witness: January 21.

Q. Can you say, Mr. Schaefer, whether or not there were any excavations upon which hand excavation had been performed on the floor of the excavation on that date? If you can't say, why, don't. If you can, why, I want you to.

A. I don't think so.

Mr. Holman: I again move that be stricken, your Honor.

Q. Mr. Schaefer, without taking the time now, do you have [343] any memorandum from which you could refresh your recollection on that?

A. I have.

Q. Well, undoubtedly you're going to be on cross-examination tomorrow. Prior to tomorrow will you examine and see if you have some memo which you made at the time which will refresh your recollection on that point? A. I will.

The Court: And the answer will be stricken in the meantime.

Q. Mr. Schaefer, will you describe the banks of the excavations as you examined them on January 21, with particular reference to the slope, if any?

A. Well, there had been no slope.

Q. And what was the—I don't know what you call it—the condition or the angle from the bottom of the surface of the ground of the banks. Did you answer, Mr. Schaefer? A. No, I didn't.

Q. Do you understand me, Mr. Schaefer?

(Testimony of M. C. Schaefer.)

The Court: Do you understand the question?

A. If there had been no hand excavation?

Q. No, I'm asking about the bank. You say there was no slope. Now, I'm asking you what was the condition of the bank with reference to slope; you say no slope; maybe that answers it. [344]

A. No, there was no slope. It didn't provide for any slope.

Q. You mean there was no slope either way?

Mr. Hawkins: Just a minute; your Honor, I submit the witness has answered the question.

The Court: I think "no slope" would mean vertical in this case.

Mr. Hawkins: Either vertical or horizontal.

Witness: Here's the point there. If it was that there had been some hand excavating, then the banks were vertical. If it was that there had been no hand excavating, some of those holes were ditched out like that to a point, so to say, at the bottom, the outside edge of the hole, after being dug down from that point, would have formed vertical banks. That's the point.

Q. I see.

A. Why I was a little bit stuck in giving you an answer.

Q. Did you go out and inspect the job again, Mr. Schaefer, after January 21?

A. After January 21, January 23 we had a meeting at Seattle in Holman's office on being out on the job again on the 9th of February.

(Testimony of M. C. Schaefer.)

Q. Of what year? A. 1945.

Mr. Holman: That, your Honor, is objected to as immaterial, irrelevant, and outside of the issue, except [345] for the purpose of the witness describing conditions unchanged, if they were, on and after January 3, 1945. In other words, may it please the Court, the principal contractor has given formal notice of termination as of January 3, 1945, by Exhibit 31.

The Court: Are we still talking about 1068, now?

Mr. Holman: Yes, sir, on 1068. In other words, that is subsequent to the termination, if there was a termination.

Mr. Olson: Subsequent to your writing the letter.

The Court: Well, I think it might have a bearing on what the condition was previously. I'll overrule the objection.

Witness: All right; on February 9 we went over, that is, Mr. McKelvey, Mr. Kelly of Mr. McKelvey's office, Mr. Hewitt of Yakima, Pat Darcy—

Q. Who is Mr. Hewitt of Yakima?

A. He's an engineer; Pat Darcy, our superintendent, went over to 1068 and inspected some of the excavations.

Q. And how were the excavations done?

A. And the excavations at that time were the same general type as used on 1062. Those that had been—those that fine graders had worked in had

(Testimony of M. C. Schaefer.)

vertical banks; some of the other excavated holes had the slope, just a rough hole, so that the outside edge of the hole would, from [346] perhaps to the width or dimension of the structure, and allowing from there on down to produce a vertical bank, the same general type that had been used on those that were fine graded.

Q. Now, getting back just for a moment to this previous date of January 21, 1945. On that date, had Macri and Company done anything with reference to forms, making panels?

Mr. Holman: Objected to as outside the issues, your Honor.

The Court: Overruled.

Witness: January 21 they had some platforms built at the yard, and they had some simple, had, say, simple structures constructed on these platforms. I believe we did check as to how many panels they had built at that time. I'd have to look at the record.

Q. First, did Mr. Hewitt at your request take measurements on the excavations that had been made by Macri and Company on 1062?

A. He did.

(Whereupon, letter to Macri dated February 13, 1945, was marked Plaintiff's Exhibit No. 32 for identification.)

Q. Mr. Schaefer, do you know whether or not Mr. McKelvey or his office upon their return to Seattle after being on the job on February 9 as you

(Testimony of M. C. Schaefer.)

have just described, wrote [347] the Macri Construction Company a letter specifically referring to 1062 and 1068, a copy of which is handed you as plaintiff's identification 32?

Mr. Holman: Your Honor, I object to the question of writing; if he's talking about sent, that's what he means, I think, don't you?

Mr. Olson: I think I would have to show that it was not only written, but sent; if it was any letter that we wrote it was sent out.

Q. If you know?

A. Well, I believe they did; I don't know.

Mr. Holman: I move that be stricken.

Mr. Olson: I have served upon counsel a notice to produce the original, and as I understand, counsel is unable to find the original, and believes it was never received.

Mr. Holman: I believe more than that. I believe that was not a copy of the letter, unless somebody has copied a letter that Mr. McKelvey's firm sent, since it bears no indication of any dictation or transcription usual to their office. I have a number of their letters, and it bears no signature of the firm, and its contents are entirely strange to us, and the demand made upon us did not identify the writer of the letter, so that we have never seen it.

Mr. Olson: I think you're correct, this is not a carbon copy, but a copy my office made off the carbon copy.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. You're unable to say, Mr. Schaefer, whether or not the original of this letter was ever mailed?

A. I couldn't say.

Mr. Olson: If your Honor please, in order not to disrupt the order of identifications, may I withdraw this? I'm perfectly willing to leave it here, but I can readily see it is useless for me to offer it, so if it won't disrupt the numbering system I'll withdraw it. I take it you're not willing for it to go in?

Mr. Holman: No, I'll never agree to that.

Mr. Olson: You may cross-examine.

The Court: We can have Mr. Holman cross-examine first, and then Mr. Hawkins, and then Mr. Ivy. Would that be acceptable to counsel, in that order?

Mr. Holman: That will, your Honor.

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, will you produce, please, the letter you say you received from Mr. Staples, Mr. Macri's superintendent, before you went on to 1062? Do you have it handy, Mr. Schaefer? If you have, all right; otherwise you can produce it in the morning. [349]

(Testimony of M. C. Schaefer.)

Mr. Olson: I might say that is not included in the notice to produce, and if it will expedite any, we can get it out in the morning, or now.

Mr. Holman: I don't want to take the time for search.

The Court: He has it there, I think.

Q. Very well. Maybe you won't have to take it apart, if you'll just let me see it. Now, you received an undated letter, mailed February 29, 1944, from Yakima, addressed to Mr. Matt Schaefer, the Concrete Construction Company, Portland, Oregon, signed by George M. Staples, superintendent, on Macri and Company's stationery, showing 209 South 4th Street, Yakima, Washington; the letter you have before you? A. Yes.

Q. Is that the letter that you testified about on direct examination? A. It is.

Q. And were these endorsements which are on the side in pencil on it when you received it, or not? A. They were not.

Q. In other words, those are some of your office notations? A. They were.

Q. And was the longhand writing on the bottom, the "P.S." on it at the time? [350]

A. It was.

Q. Is there any objection to pulling this out of the file? A. O.K.

Q. Pardon me, was the figure 1 on there at the time? A. It was not.

Q. In other words, that's some of yours?

A. That is the numbering.

(Testimony of M. C. Schaefer.)

Q. First letter on the job; first letter you got?

A. That's right.

Mr. Olson: I might suggest if the bonding company is interested in this they can look at it at the same time.

Mr. Ivy: Is that on 1068?

Mr. Holman: No, on 1062, Mr. Ivy.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Will you—— A. Just pull it out.

Q. Yes. The other paper attached is the answer?

A. That's right.

Mr. Holman: May I have this marked for identification, your Honor, consisting of two sheets of paper and an envelope?

(Whereupon, letter to Matt Schaefer and reply dated March 2, 1944, was marked Defendant Macri's Exhibit No. 33 for identification.) [351]

Q. Handing you Macri's identification 33, the pencil memo which is on the letter, on Macri and Company's stationery, is matter that you had put on after you had received the letter?

A. That's correct.

Q. Is there any objection to obliterating that now? A. No, sir.

Q. Let's do that.

The Court: Why not let the clerk erase it? Is it in pencil?

(Testimony of M. C. Schaefer.)

Q. Very well. Now, was that the first communication of any kind you had with respect to 1062, in issue in this case?

A. That is correct, yes.

Q. And that was not preceded by any telephone or any other arrangements? A. No.

Q. And the answer which is shown on the upper page of this exhibit—identification, I believe it is, 33, dated March 2, 1944, was written under your direction, or at least a communication from your office, an authorized communication?

A. Well, I would have to be refreshed on that, as to whether I had——

Q. Well, is it a Schaefer communication that was authorized by your office, or not, Mr. Schaefer?

A. It went from our office. Whether I was asked about it before it went out, I'm not positive, unless I'd read the letter.

Q. Who is Ben McCue, that signed that?

A. Ben McCue had been a truck driver, and he had certain bookkeeping and office experience, and I had him in the office there while I was on the sick list.

Q. Then will you answer me, please, whether or not that was a letter authorized to go from your office at that time, or not? A. Yes.

Q. Very well. And this number 246 which is on here——

Clerk: I put that on, Mr. Holman. That's the case number.

(Testimony of M. C. Schaefer.)

Q. Then you later signed the contracts, did you not, the contract which is in evidence as the sub-contract on specification 1062? A. I did.

Q. Plaintiff's Exhibit 5. Was there any intermediate correspondence between this communication which is marked plaintiff's 33 and the signing of the contract between you and Macri?

A. There were 'phone calls.

Q. I asked you about correspondence, sir.

A. No. [353]

Q. Then at the time of signing the contract, or shortly thereafter, did you secure from the Glen Falls Indemnity Company a bond to Macri and Company? A. I did.

Mr. Holman: Will you mark that for identification, please?

(Whereupon, Bond delivered to Macri on Specification 1062 was marked Defendant Macri's Exhibit No. 34 for identification.)

Q. Handing you Macri's identification 34, is that the bond that you delivered to Mr. Macri with the contract, or after the contract was signed?

A. As to whether the bonding company forwarded that or whether I did, I wouldn't—

Q. Will you read the question, Mr. Reporter?

(Whereupon, the reporter read the last previous question.)

Witness: Yes.

Q. Did you secure this identification 34 and send it, or did the surety send it, if you know?

(Testimony of M. C. Schaefer.)

A. I wouldn't be able to say.

Q. Now, did you know that identification 34 bore the execution of the surety, but not your signature as principal? Look at it.

The Court: Is this on 1068 or 1062? [354]

Mr. Holman: 1062, your Honor.

Witness: I didn't know that.

Q. And did you ever call attention to Mr. Macri that you had submitted a bond without your signature?

Mr. Olson: If your Honor please, it's our bond; there's nobody suing on our bond on this job, so the fact may be a blank bond was submitted, nobody's suing us on it. This is wholly irrelevant. There is no contention by Macri and Company that we did not perform. I don't see the purpose gained by it.

The Court: I don't see the materiality of it. Of course, there's been nothing offered before the Court.

Mr. Holman: I now offer, your Honor, as part of the transaction for the execution of Plaintiff's Exhibit 5, the identification which is marked as Macri's 34, together with Macri's 33, the only correspondence preceding the transaction.

The Court: Well, let's take them up in order. First number 33, Mr. Olson.

Mr. Olson: I have no objection.

The Court: Defendant Macri's identification 33 will be admitted.

(Testimony of M. C. Schaefer.)

Mr. Hawkins: We would like to make a formal objection for the record that none of these letters were addressed to Goerig and Philp nor called to their attention, [355] are immaterial as far as they are concerned, and should not be admitted.

The Court: Do you have any objection, Mr. Ivy?

Mr. Ivy: No, I do not, your Honor.

The Court: Identification 33 will be admitted.

(Whereupon, Defendant Macri's Exhibit No. 33 for identification was admitted in evidence.)

The Court: Now, defendant's identification 34. Have you offered that?

Mr. Holman: I was just letting counsel examine it.

Mr. Hawkins: We have no objection.

Mr. Olson: I object, your Honor, to the introduction of identification 34. It can have no possible bearing on this case, wholly immaterial.

Mr. Holman: The other half of the transaction under Exhibit 5 requires that the plaintiff shall furnish a bond, and 34 has been identified by the witness as the bond he furnished, and it speaks for itself.

Mr. Olson: There is nothing in the pleadings whatsoever involving Mr. Schaefer's performance bond under his contract with Macri, no claim that he did not perform his sub-contract, the bonding company is not a party, not involved in any manner.

The Court: That's the performance bond?

Mr. Olson: Mr. Schaefer's. [356]

(Testimony of M. C. Schaefer.)

The Court: Is it your contention that he has no right to sue, because of his failure to furnish a bond? I don't get your purpose.

Mr. Holman: My purpose is to have the sub-contract supplemented by the bond called for, as furnished by Mr. Schaefer.

The Court: Well, I'll admit it for what it is worth. I don't see its materiality in the controversy here.

(Whereupon, Defendant Macri's Exhibit No. 34 for identification was admitted in evidence.)

The Court: It's time to adjourn so far as this case is concerned, but the Court has some other matters to take up. This case will be resumed at 10 o'clock tomorrow morning.

(Whereupon, the Court took a recess in this cause until Wednesday, February 26, 1947, at 10 o'clock A.M.)

Yakima, Washington, February 26, 1947.

(All parties present as before, and the trial was resumed.)

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Holman:

Mr. Holman: Counsel, I asked you to produce certain letters. May I have them now for identification?

(Testimony of M. C. Schaefer.)

(Whereupon, letter Macri to Schaefer dated November 30, 1944, was marked Defendant Macri's Exhibit 35 for identification.)

(Whereupon, letter Macri to Schaefer dated December 27, 1944, was marked Defendant Macri's Exhibit 36 for identification.)

(Whereupon, letter Bureau of Reclamation to Schaefer, dated January 25, 1945, was marked Defendant Macri's Exhibit 37 for identification.)

(Whereupon, letter Macri to Schaefer dated January 27, 1945, was marked Defendant Macri's Exhibit 38 for identification.)

Q. Mr. Schaefer, at the time of executing the sub-contract for performance of specification 1062, schedule 1, or at least before starting your work, you had access to and had read the specifications covering that job which are in evidence?

A. I have.

Q. And you had access to or had consulted what are known as the lay-out typical sections which are in evidence?

A. I did.

Q. At the time of the execution of that sub-contract had you purchased any of the equipment that you described yesterday, or did you purchase it after? You described, [358] if I remember, a Buggy-mobile and a Mixomobile.

A. I'm quite sure that both those pieces of equipment were purchased after.

(Testimony of M. C. Schaefer.)

Q. Now, with reference to any diary you have, or any information you have, will you please give me as near as you can the dates upon which you were on the work, 1062, prior to March 30, 1945? Do you have any record, Mr. Schaefer?

A. Yes.

Q. I want to know what days you were there, or at least the number of days.

A. Well, I was there about 25 times, or 25 days.

Q. Do you have them listed? If you have, Mr. Schaefer, if not——

A. On March 16 of '44, March 17, April 12, 27, 28, 29, May 2, 19, June 15, 23 and 24, September 21 and 22, October 20——

Q. Did you say 24 and 27?

A. 21 and 22; October 20, December, about 6 or 7——

Q. 6 or 7?

A. Yes, and about the 17th.

Q. About the 17th?

A. January 20 and 21, February 9, March 30 and 31.

Q. What are you consulting, Mr. Schaefer? Is that something you made up for the purpose of trial? [359]

A. This I took from the daily reports.

Q. Oh, yes, in other words, you made it up for the purpose of trial now? A. Yes.

Q. Mr. Schaefer, I hand you what have been marked Macri identifications 35 to 38 inclusive, and

(Testimony of M. C. Schaefer.)

will ask you if you received those letters in due course of mail, as indicated by those identifications? I just got them from your counsel.

The Court: He has identifications 35 to 38 now, is that the ones he's looking at, Macri's?

Mr. Holman: Yes, your Honor.

Mr. Olson: The only question they've asked you now, Mr. Schaefer, is did you receive those letters?

Witness: Yes.

Mr. Holman: I offer in evidence these identifications, your Honor. They had them in due course of mail, and I would like to read them to the Court if I may.

Mr. Olson: I have no objection to them being admitted as having been received by us.

The Court: They will be admitted.

(Whereupon, Defendant Macri's Exhibit No. 35 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 36 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 37 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 38 for identification was admitted in evidence.)

Mr. Holman: Or would your Honor prefer to read them?

The Court: If you think they should be read now, you may read them.

Mr. Holman: Just for the purpose of co-ordination, your Honor.

The Court: Yes, I can keep the continuity better.

(Whereupon, Mr. Holman read Exhibit 35.)

Mr. Holman: Do you have that other letter?

Mr. Olson: It is in evidence. I was just going to remark, in order for it to be intelligent, they should be both considered together.

Clerk: Plaintiff's Exhibit 27.

Mr. Holman: May I hand it to the Court?

The Court: Yes. I've read it but I haven't in mind just what it is. I'll just look it over first, and then you can read the others. All right.

Mr. Holman: May I ask counsel to produce the letter of September 18, 1944, from the Bureau?

Mr. Olson: Well, that's addressed to you, Mr. Holman. [361]

Mr. Holman: Yes, but the copy that was sent to Schaefer.

Mr. Olson: I haven't got it. The original, as I understand your letter, was mailed by the Bureau of Reclamation to Macri and Company. They should produce the letter, rather than us.

Mr. Holman: Well, just a minute your Honor. May I pause to read this letter when I have it identified?

(Whereupon, Letter Bureau of Reclamation to Macri dated September 18, 1944, was marked Defendant Macri's Exhibit No. 39 for identification.)

Mr. Holman: Shall I proceed with these others, your Honor?

(Testimony of M. C. Schaefer.)

Mr. Olson: Were you going to read this, so that the Court will have it in his mind?

The Court: He'd have to offer it first.

Mr. Olson: If your Honor was going to have to read it in order to rule on it, I thought maybe I could listen to it the same time you were. Which-ever you want. I'll read it first, if you like. Mr. Schaefer, while I'm doing that, would you look to see if you have a copy of a letter from the Department of the Interior dated September 18, 1944?

The Court: What is the date of that letter?

Mr. Holman: September 18, 1944. [362]

Witness: Yes, I have.

Mr. Olson: Well, your Honor, if Mr. Schaefer says that he got a copy of it, I can read it later, then.

Mr. Holman: I offer it in evidence, then.

The Court: I assume that all these letters are offered for the purpose of showing contentions made by the parties and notice to the other party, and perhaps some admissions. I don't know, I haven't seen any yet, but they certainly wouldn't be competent evidence of the claims made in there as to whether these things have been done or haven't been. It is only evidence of notice to the other party of what their contentions are. The same thing will be true of the Bureau letter.

Mr. Olson: As we got a copy of it, I have no objection to it going in, on the basis that it was sent and we got a copy of it.

The Court: It is admitted.

(Whereupon, Defendant Macri's Exhibit No. 39 for identification was admitted in evidence.)

(Whereupon, Mr. Holman read Exhibit 39 to the Court.)

Mr. Holman: The next communication, your Honor, is Macri's Exhibit 36, addressed to Concrete Construction Company, on Macri stationery.

(Whereupon, Mr. Holman read Exhibit 36 to the [363] Court.)

Mr. Holman: The additional communication from the Bureau, your Honor, is defendant Macri's Exhibit 37. May it be understood that this doodling, or graphs, or whatever it is, in pencil may be disregarded?

Mr. Olson: Yes.

Mr. Holman: And by the way, counsel, on Exhibit 35 I notice somebody has written here "no sub-contract". Could that be stricken?

Mr. Olson: Yes.

Mr. Holman: May I have your Honor's permission to strike it?

Mr. Olson: I don't think the Court would pay any attention to it anyhow.

Mr. Holman: No, I know, but an exhibit is an exhibit.

(Whereupon, Mr. Holman read Exhibits 37 and 38 to the Court.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. It is a fact, is it not, Mr. Schaefer, that you, as indicated by your times of attendance upon these jobs, did not act as superintendent of the jobs?

A. I did not.

(Testimony of M. C. Schaefer.)

Q. And at the time this work was going on, did you have other work going on elsewhere? [364]

A. I did.

Q. Where and what kind of jobs did you have going on?

A. Well, we had work going on around Portland.

Q. What kind of work, Mr. Schaefer, and where was it?

A. Well, there I'd be—it would be form work. I couldn't right now name specific jobs, perhaps?

Q. Why do you say perhaps?

A. Well, there is—we do work for perhaps 5 to 800, that is, have 5 to 800 jobs a year.

Q. Mr. Schaefer, what I'm asking you, what jobs you had in hand at that time, outside of these jobs 1062 and 1068. If you can't tell me, say so.

A. Well, I'd have to refresh my mind by our files on that.

Q. Do you have those here?

A. No, I don't.

Q. And can you make a schedule of those jobs, showing the amount of work involved and with whom they were? A. Yes.

Q. Will you do that, and furnish it? Will you contact your office and have that done so it can be available here?

A. I might have someone bring up the file of 1944.

Q. Well, I don't want to be captious on it, Mr. Schaefer, but I would like that information. I

(Testimony of M. C. Schaefer.)

would like to know the jobs you had, where they were, what they were. I'm talking about concrete construction jobs. [365]

Mr. Olson: May I ask the purpose of it? Just offhand I don't see the materiality. Perhaps there is something I don't see.

Mr. Holman: It is a matter of preliminary on cross-examination, your Honor.

The Court: Well, even though it is preliminary, if he's to furnish all this information it should be material.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Can you tell me approximately what jobs you had? In other words, you were not here; what were you doing?

A. I was tending to business back in Portland, so as to make enough money to keep this job going up here.

Mr. Holman: I move that last be stricken.

Mr. Olson: I object to that. He asked what he was doing.

The Court: Yes, I'll not strike it. However, Mr. Schaefer, I think it would be best if you refrain from the type of reply you have been making, and just answer seriously counsel's questions.

(Testimony of M. C. Schaefer.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Can you tell me approximately how many jobs you had, one, two, three, five, or whatever it was, while this work was going on?

A. In excess, I'll say, in excess of 200 jobs. [366]

Q. You had in excess of 200 jobs going on while this job was going on?

A. That's right.

Q. And I believe you referred to your brother as your general superintendent?

A. That is right.

Q. What was his name?

A. William E. Schaefer.

Q. And he was in charge of the over-all operations of all of the jobs, was he?

A. That is correct.

Q. Sir? A. That is correct.

Q. Now, was this equipment which was brought to 1062 brought from one of the other jobs, or had it been used on one of the other jobs, before it came here?

A. Yes.

Q. What type of work had the Mixomobile been used on?

A. Well, on—in other words, we were operating at that time we had two Mixomobiles, and they were both used on house basements, or a pumping station, for, let's say it is the job there on Sauvie's Island, for the Land Conservation Department, or something of that sort.

Q. In the Portland area?

A. Yes. [367]

(Testimony of M. C. Schaefer.)

Q. And in the Portland area there were paved streets and accessible roads for that to move around, correct? A. That is right.

Q. Now, when that Mixomobile arrived here, it had a 15 or 18 foot elevator on it, did it not?

A. Tower, yes.

Q. Tower, you call it? A. That's right.

Q. And that was for the purpose of lifting concrete to an elevation, say, of a second story building?

A. To the height of a one story building.

Q. Yes, sir, the height of one story, and the Mixomobile was set upon what type of truck?

A. Ford.

Q. Ford truck; and it had wheels and tires?

A. That's right.

Q. And it was not replaced with caterpillar treads when it was brought here?

A. It was not.

Q. And the Buggymobile, had that been used elsewhere, or did you buy that for this job?

A. Well, I bought both pieces of equipment for this job, but the Buggymobile had been used on other jobs, yes.

Q. A Buggymobile is a little short rig, isn't it, with a little bucket that can take it up and deliver it—it is [368] a fast moving thing?

A. Well, it is a three-wheeled rig with a hopper that the concrete is dumped from the mixed into the top of this hopper.

Q. Well, they're used in coal yards, gravel pits, and everywhere else for quick handling?

A. No, that's a Scoopmobile.

(Testimony of M. C. Schaefer.)

Q. What do you call this one?

A. This is a Buggymobile.

Q. And what sort of a truck did it have?

A. Truck?

Q. It just had a three-wheel chassis, is that it?

A. That's right.

Q. Now, did you have any—you had no revolving concrete mixers on the job, did you?

A. Well, now, I don't get what you mean; the drum——

Q. You had no transit mixer?

A. No, no transit mixer.

Q. And did you have any of those in Portland?

A. No.

Q. You have none of those in your equipment?

A. No.

The Court: I'm not sure that I know what a transit mixer is.

Mr. Holman: Your Honor, it is these trucks—
[369] your Honor has unquestionably seen them.

The Court: With a mixer on the truck?

Mr. Holman: It is moving while they go along.

The Court: Yes, I know.

Cross-Examination

(Continued)

By Mr. Holman:

Q. What was the over-all weight of the Mixomobile, approximate, Mr. Schaefer?

A. About eleven ton.

(Testimony of M. C. Schaefer.)

Q. Eleven tons?

A. That's just—that is as close as I would be able to guess.

The Court: I didn't get the last.

A. That would be as close as I could guess it without checking back.

Q. You have a way of dropping your voice, and we don't get the end of the sentence. Of course, the Buggymobile was a very light rig, wasn't it?

A. Comparatively light, yes.

Q. What did it weigh?

A. That I wouldn't really be able to say.

Q. When you received this letter which is in evidence, from Mr. Staples, did you go on to 1062 location before you contacted Mr. Macri?

A. No, I contacted Mr. Macri before we went to the site.

Q. The first date you gave me was March 16, 1944. Had you [370] contacted Mr. Macri before that date? A. Yes.

Q. And you had signed the contract, hadn't you?

A. Yes.

Q. Then is it or is it not a fact that you signed the contract before you were on the job?

A. Yes.

Q. In other words, you signed the contract without making an inspection of the job, correct?

A. Before we started work on the job; no, I was over the job site before we signed the contract.

(Testimony of M. C. Schaefer.)

Q. That's just what I asked you a minute ago, Mr. Schaefer, whether you were on the job before you contacted Mr. Macri.

A. No, I contacted Macri by 'phone.

Q. You telephoned Macri?

A. I telephoned Macri.

Q. All right.

A. And then we went up to see Mr. Macri after our telephone conversation.

Q. Where, Seattle or here? A. Seattle.

Q. At Seattle; all right.

The Court: Is this before the contract was signed, now, he's talking about? [371]

A. That's right.

Q. I think so, yes. I'm trying to find out. All right, then what?

A. At that time we talked about lumber, and about roads, and those items about the batching, and from there we went over to Sunnyside and looked at the job site.

Q. When you say we, is that Macri and you?

A. That is brother Bill and myself.

Q. Brother Bill is your general superintendent?

A. That is right.

Q. You and your general superintendent went over on the work and saw the conditions there before you signed the contract, is that right?

A. We did.

Q. Then when you left that job did you go back to Portland? When you left the location of 1062 did you go back to Portland, or did you go back to Seattle? A. We went back to Portland.

(Testimony of M. C. Schaefer.)

Q. And did you have the sub-contract with you? Did you sign it down there, or did you sign it in Seattle?

A. I again had a meeting with Mr. Macri.

Q. Mr. Schaefer, would you answer my question? Did you sign it in Seattle, or did you sign it in Portland, or somewhere else? Where did you sign it?

A. I believe we signed it at Seattle. [372]

Q. In Macri's office? A. Yes.

Q. Now, when you were over here with your brother Bill did you go to the Bureau office here in Yakima or at Sunnyside? A. I believe not.

Q. Yes, sir. Did you consult their drawings or their plans or their specifications at that time?

A. We consulted Mr. Macri's plans.

Q. The copies in the Macri office in Seattle?

A. Yes.

Q. All right; and what did you do toward going over the job itself? I have in mind now particularly with respect to the laterals. Did you walk out those laterals, you and Bill, your brother Bill?

A. No, we didn't walk down the laterals. We walked out over the general area there.

Q. Did you make any core tests for soil?

A. We did not.

Q. Did you make any shovel excavation for soil content? A. We did not.

Q. Did you inspect any other excavations of other subcontractors who were then at work?

A. We saw some of the other work, yes.

Q. What work did you see? [373]

(Testimony of M. C. Schaefer.)

Mr. Olson: That is objected to.

Mr. Holman: This is quite important.

Mr. Olson: I would like to make my objection. It is wholly immaterial what kind of excavation, if any, someone else was to make. The type of the soil is immaterial. In other words, under the subcontract Macri and Company was to make all the excavations. That part is clear, and I think that part there is no dispute on. Whether or not Mr. Schaefer looked to see what someone else was doing or what the soil conditions were I think is wholly immaterial.

Mr. Holman: At this time, I've been waiting for the place to arrive to call your Honor's attention to this matter of theoretical slope, and so that your Honor can get the full import of the position taken by the respective parties, if I may, your Honor.

The Court: Yes, all right.

Mr. Holman: In plaintiff's Exhibit 3, paragraph 47, your Honor, I have my own copy, and I would like to just read that portion to your Honor.

(Whereupon, Mr. Holman read paragraph 47 of plaintiff's Exhibit 3.)

Mr. Holman: I take it your Honor is thoroughly familiar with what is meant by neat lines?

The Court: Yes, the outside of the concrete. [374]

Mr. Holman: The next section is with respect to back fills, your Honor. Now, my question here, your Honor, is whether or not this witness inspected these specifications and inspected work then going

(Testimony of M. C. Schaefer.)

on in the field on this project. I think it is an entirely competent question, I submit.

Mr. Olson: It is my position, your Honor, that these specifications concerning 1062 are the controlling agreement between the parties as to the type of excavation that was to be made. In other words, supposing I was attempting to show your Honor that this other contractor, I don't know what the situation was, was excavating three feet out?

The Court: I don't think the purpose of his examination goes to that. It is whether the character of the soil was material, involving the difficulty of maintaining these slopes called for in the specifications. I understand it is conceded here that the principal contractor was to do the excavations. I can hardly see how whether it was difficult to do it under the circumstances was of any concern to the sub-contractor, who was to merely put in the structures. He was supposed to get the excavations according to the specifications, regardless of the difficulty to the contractor.

Mr. Holman: That's correct, your Honor, but the [375] 1 to 1 is an arbitrary pay, and not the actual slope according to those specifications.

The Court: Well, it is to be paid for, and it is to be proper in a manner for the setting of concrete. If your contention is that it is a proper procedure to make them vertical, or other than a 1 to 1, this might be material.

Mr. Holman: That is my position, your Honor. The specifications require as long as the contracting officer accepts the excavations——

(Testimony of M. C. Schaefer.)

The Court: That is some representative of the Bureau of Reclamation?

Mr. Holman: That's right.

The Court: Is it your position that an official of the Bureau of Reclamation modified this contract, and directed vertical walls, or a slope other than 1 to 1 on dirt?

Mr. Holman: No, my position is that the contracting official paid on computation, just as testified here. Your Honor will recall, I think it was Mr. Nuttley, I asked if he measured excavations, he said no, that was a matter of computation. In other words, they allowed upon the structures themselves, and the purpose of the neat line, your Honor, the 1 to 1 slope, is just as indicated by those specifications; the man can't go outside and [376] excavate a half acre and put in a six foot box, and get paid for anything except up to the neat line.

The Court: That's true as far as pay is concerned, but Schaefer isn't concerned with what was paid to the principal contractor, is he?

Mr. Holman: No, he was not.

The Court: The issue is whether the excavation was made up to specifications.

Mr. Holman: That's why I want to inquire what he saw in the field at that time.

The Court: Is it your position that general practice would govern over the contract clause?

Mr. Holman: Not at all.

The Court: Well, why is it material, then?

(Testimony of M. C. Schaefer.)

Mr. Holman: I want to cover with this witness what he saw in the field with respect to what would be the operating conditions, and therefore what would be the conditions that the contracting officer would take into consideration in making his payments. He has that authority under that provision that I read, your Honor.

The Court: Well, will you follow it up by showing that the contracting officer directed that the excavation be made on some other slope than 1 to 1?

Mr. Holman: No, sir, I cannot show that the contracting officer directed the slope to 1 to 1 or any [377] other slope, your Honor. As Mr. Nuttley testified, it was paid upon computation, it was not paid by fill, and as I read your Honor, the compensation shall be "except for the limitations above described, excavation for structures will in general be measured for payment to lateral dimensions one foot outside the structure, and to slopes 1 to 1 for common, $\frac{1}{4}$ to 1 for rock." For instance, your Honor, if that were a slope in pure running sand, they would still only measure 1 to 1; that might be 3 to 1.

The Court: Yes, I appreciate that.

(Mr. Holman read further.)

The Court: Let's see, wait a minute, here. Is this what you read "That where the character of the material is such that it can be trimmed to the required lines without the use of intervening forms"?

Mr. Holman: That's right.

(Testimony of M. C. Schaefer.)

The Court: Doesn't that mean the character is such you can pour the concrete right against the wall?

Mr. Holman: Yes.

The Court: Is it your contention that in this dirt work the concrete could be poured right against the intervening wall?

Mr. Holman: No, it is not, your Honor.

The Court: Go ahead. I'm trying to get your contention. [378]

Mr. Holman: That's one of the exceptions; if that is the condition, that is the pay; they lose all the 1 to 1 slope.

The Court: How is that material, if there is none of that material on this job here.

Mr. Holman: Well, we haven't gone over our case yet.

The Court: Well, go ahead, I'll let you go into that matter of cross-examination.

Mr. Holman: May I finish this presentation, your Honor?

The Court: Yes, go ahead.

Mr. Holman: "Provided further, that for any excavations where in the opinion of the contracting officer the conditions warrant, the excavation will be measured by the contracting officer." That leaves it absolutely to the determination of the contracting officer for payment.

The Court: Yes, as to what should be paid for. Now, I'm trying to get your contention as best I can. Is it your contention that because the contracting officer has some latitude in ascertaining

(Testimony of M. C. Schaefer.)

what should be paid for, that that relieves the principal contractor of making a slope of 1 to 1 for the use of the subcontractor? [379]

Mr. Holman: Absolutely, your Honor, yes, it does, not only as a contract proposition, but a practical proposition.

The Court: If the officer of the Bureau then came in and said "Down here on this part of the work all you have to do is construct vertically, that's all we'll pay for" then you would be justified in making it vertical?

Mr. Holman: Because the material is such that they can pour right against the wall, yes, your Honor, then they wouldn't pay for that one foot out.

The Court: Do you seriously contend, Mr. Holman, that you can pour concrete against dirt such as you had down here without intervening forms?

Mr. Holman: Your Honor, I haven't seen this project, but I've waded through lots of Yakima soil, so I say no.

The Court: Well, I assume you know what the condition is down on this job.

Mr. Holman: Yes, I do.

The Court: And I don't believe you're making that contention, that you can pour concrete without forms, except in your rock work.

Mr. Holman: Not at all, your Honor, but that is one of the specifications; but now what I'm asking this [380] gentleman is whether or not he either made tests, or dug, or saw other excavations, and I think your Honor said he could answer.

(Testimony of M. C. Schaefer.)

The Court: Well, I'm not too sure about that. I don't get your point yet, Mr. Holman. I'm sorry I'm so obtuse, but I can't tell what you're driving at. Why is it material that he examined this soil condition?

Mr. Holman: I don't necessarily want to explain my purpose to the witness, but I want to know what this witness was informed about the general operating conditions there before he signed the contract.

The Court: Well, that might have some bearing on the way he performed, and the way he put his concrete in. I'll overrule the objection.

Mr. Olson: For the record, I'll not argue with your Honor, but just to put this additional matter in support of my objection, if the purpose of it is to show that excavation on any slope other than 1 to 1 was applicable to this project, the question is objectionable for the further reason that an entirely different situation might exist where the same contractor was making the excavation and installing the concrete structures. The contractor then might say "Sure, it's going to cost me more money to put in my concrete structures, but I'm going to save it on my excavations". Where the same [381] contractor is doing both types of work an entirely different situation would arise. On this project we had two separate contractors. The question is further objectionable on that ground.

The Court: Well, I'll overrule it, simply for the purpose of showing in a general way how familiar he was with the site.

(Testimony of M. C. Schaefer.)

Witness: Yes, I did see some other work.

Q. (By Mr. Holman): And did you see work where forms were being installed? A. I did.

Q. And did you see work where concrete was being poured?

A. I don't remember whether they were pouring concrete at that time, but I seen work where concrete had been poured.

Q. In other words, you didn't see the movement of concrete over this general terrain and area at that time? A. I did not.

Q. Did you make any inquiry as to the difficulty or reasonableness of movement of equipment such as yours over that area?

A. I figured that from my own knowledge, by driving over the terrain.

Q. In other words, you determined that the Mixomobile could travel over that area?

A. With certain load conditions. [382]

Q. That's what I'm getting at. Did you determine whether or not, at the excavations you saw, the excavation was out one foot out, at the base of the structure?

Mr. Olson: That's objected to, your Honor.

The Court: I'll sustain the objection. I don't think it is material.

Mr. Holman: I have an entirely different reason.

The Court: All right, what is it?

Mr. Holman: My reason is to ask this witness, if he was not satisfied by one foot out, as called for by the specifications, why he did not contract for a wider width.

(Testimony of M. C. Schaefer.)

The Court: He isn't claiming he asked for more than a foot. He's claiming he didn't get a foot, and 1 to 1, as I understand it, and it doesn't seem to me it is material what was done on some other sub-contract on this job. I don't know what the sub-contract was, and the record doesn't show.

Mr. Holman: What I'm asking is with respect to what he physically saw there with respect to other operations at the time. I want to know how well advised he was.

The Court: Objection sustained. We'll recess now for ten minutes.

(Short recess.) [383]

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. When you talked with Mr. Macri after inspection in the field, and before signing the sub-contract on 1062, did you make any request for road inclusion? A. Yes.

Q. How did you make it?

A. We told him that there was so many of the sand dunes, and there were spots throughout the ground there that would have to be corrected or some provision made for roads.

Q. Just a minute, I asked you how you brought the notice to him. I didn't ask you what he said. Was that oral? A. That was oral.

(Testimony of M. C. Schaefer.)

Q. That was not followed by any writing at any time? A. No.

Q. Now, then, you signed the sub-contract without such a provision in it? A. That's right.

Mr. Olson: Now, your Honor, I ask that that last question and answer be stricken as to whether or not the sub-contract included such a provision in it. The sub-contract will speak for itself, as to whether it contained a provision for roads. We contend it does, and——

Mr. Holman: I think counsel's objection is [384] partially right. I would like to clear that up without any specific question. I didn't mean any catch question.

The Court: Perhaps you had better ask the question again, then.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Then you signed the sub-contract in evidence without having any specific provision typed in with respect to roads? A. That is correct.

Q. And you signed the sub-contract without having any specific provision typed in with respect to a specified slope or bank?

Mr. Olson: I'm going to object to that. The sub-contract in that regard certainly definitely speaks for itself. In my opinion there is a definite provision in there where it incorporates the specifications.

(Testimony of M. C. Schaefer.)

Mr. Holman: That, your Honor, is a matter of law we're going to cover in our argument.

The Court: I'll sustain the objection to that. You might ask the same question with respect to everything questioned in the general contract.

Mr. Holman: I don't intend so to do, your Honor.

The Court: You might ask him if he signed it without any specific description of the size of the excavation to be made, and so on. I'll sustain the objection [385] to that.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Then had you at the time of the contract, did you know whether or not there was a lumber shortage? That is specifically provided as to lumber in the contract, your Honor.

A. Yes, I knew that lumber was getting hard to get, but——

Q. And did you know as to the requirement at that time to have priority in order to secure lumber?

A. That's right.

Q. And did you inquire of Mr. Macri as to whether or not he had a priority?

A. The lumber was a——

Q. Pardon me; answer my question, will you please, Mr. Schaefer? I asked you whether you inquired from Mr. Macri as to whether he had a priority to obtain lumber.

A. I believe I did ask him.

(Testimony of M. C. Schaefer.)

Q. And did you have a priority to obtain lumber at the time? A. Not on this job.

Q. No, but you had a priority.

A. On other jobs.

Q. As an operating contractor you had a rating, did you not? A. That's right.

Q. What was your rating?

A. I couldn't say. [386]

Q. And you then, knowing that condition, provided specifically for Macri furnishing lumber, because of the shortage and the difficulty of obtaining lumber, isn't that correct?

A. And because he told me that he had an interest in a lumber mill.

Q. Yes, so that Macri was better able to furnish the lumber? A. Correct.

Q. Yes; O. K. Now then, your contract also provides, as you will recall, that upon completion the forms shall be cleaned of concrete, nails shall be removed, and the lumber shall remain the property of Macri; you remember that, don't you?

A. That's right.

Q. Yes. Did you do that?

A. Not as far as Macri and Company took any of the forms right on from job number 1 over to job number 2, as soon as they were stripped from the structures on job number 1.

Q. Well, I'm in doubt whether you did it or not, then. Is your answer yes or no? Did you take the concrete off and did you take the nails out, or not?

A. Out of some of the forms, yes.

(Testimony of M. C. Schaefer.)

Q. And the others, what?

A. And the others they hauled off of the job number 1 over to job number 2 before there was such opportunity.

Q. Then the answer is you did not on the others, correct? [387]

A. That's right.

Q. All right. Now, between the time you signed the contract and I think you said April, when you first met with Mr. Macri, you had done——

A. No, it was March 15 that we signed the contract.

Q. You gave a date of a meeting with Mr. Macri. Do you remember that date? You had a memo in your lap yesterday. Do you remember that date?

A. These are dates from the daily reports, which weren't made up until after we got started on the job.

Q. You remember yesterday testifying about a meeting with Mr. Macri, do you not?

A. We had many meetings.

Q. Sir?

A. I say, we had many meetings with Mr. Macri.

Q. Do you remember testifying yesterday as to two specific dates when you had meetings with Macri on the job?

A. Yes.

Q. What was the first one?

A. The first was April 29.

Q. That's what I thought you said, April 29. Now, intermediately, between the time you signed the contract and April 29, what had your field force been doing?

(Testimony of M. C. Schaefer.)

A. Between the time of signing the contract and this meeting of the 29th, they had built form panels, they had built [388] some forms in the field, they had done lay-out work and fine grading, that is, helped Macri men to establish the grades, they had done some excavating, fine grading, some cribbing and back filling, that is, for the sub-grade. I think that's it.

Q. How many forms were in at the time of the meeting in April, if you know?

A. I couldn't say exactly.

Q. Any concrete poured?

A. No, no concrete poured.

Q. No concrete mixer or conveyor on the job at the time?

A. No, there was not.

Q. It came up in July, did it not?

A. That's correct.

Q. Will you tell me, please, who was present at that first meeting with Mr. Macri in April?

A. At the first meeting there was brother, William E. Schaefer, Fred Waltie——

Q. Is he here, by the way, available?

A. Yes; Sam Macri, and his superintendent, George Staples.

Q. Now that, you say, was what date in April?

A. April 29.

Q. Thank you. And the next meeting you say was when?

A. June 15.

Q. At that meeting who was present? [389]

A. At that meeting——

(Testimony of M. C. Schaefer.)

Q. Of course, you were at this meeting; you didn't name yourself.

A. Yes. There were present Sam Macri; an engineer——

Q. Who?

A. Mr. Cohen, that's Macri and Company's engineer; Al Hunter, of Rogers Insurance Agency——

Q. Is that your surety representation?

A. That's correct; Fred Waltie, our superintendent; and myself.

Q. And the first meeting occurred where; on the job, was it, or at the——?

A. On the job, out in the field.

Q. In the field. Do you remember where in the field with respect to laterals?

A. That was on lateral 1; well, on the first lateral, rather.

Q. 59.3, you mean?

A. I believe that's the number, **yes**.

Q. And where was the second meeting?

A. The second meeting was in the field.

Q. Where?

A. Well, we had been at the same lateral.

Q. On the same lateral?

A. On the same lateral.

Q. Do you have a tabulation, Mr. Schaefer, of the work that [390] was done with respect to structures, upon removing any material by excavation?

A. Excuse me, I didn't get that.

Q. Read the question.

(Whereupon, the reporter read the last previous question.)

(Testimony of M. C. Schaefer.)

Q. Excavation for structures by removal of material.

The Court: Perhaps you had better re-phrase the question, and ask for work upon structures.

Q. Do you have a tabulation of excavation by reference to structures, and work done by your crew?
A. Yes, I have a record.

Q. Will you produce it, please?

A. The daily reports.

Mr. Olson: The daily reports? A. Yes.

Mr. Holman: Counsel, I asked if he had a tabulation.

A. No, it's not tabulated; it's just on record there, on each daily report.

Mr. Holman: I wanted a statement, is what I wanted; the list or schedule of the stations and the work done.

The Court: Well, he says he hasn't prepared that.

Q. Do you have a list of any lumber that you purchased for [391] any of this work?

A. I do not.

Q. Did you purchase any lumber for this work?

A. I don't think so.

Q. May I have just a moment, your Honor?

The Court: All right.

Q. Mr. Schaefer, would you please, if you can, furnish me with a list of the jobs you currently had at the time this work was progressing? Strike that; that was 200 jobs you said, didn't you? That's too many.

A. I would say in excess of 200 jobs, yes.

(Testimony of M. C. Schaefer.)

Q. And could you furnish me a list showing how those jobs were broken up with respect to so many for buildings, so forth and so on; could you break them down into general classifications?

A. Well, that involves pretty nearly anything that's got concrete on it.

Q. May I ask just one question with respect to the situation; were they all in the Portland area?

A. I wouldn't be able to say that.

Q. Well, was your major operation in the Portland area? A. Yes.

(Whereupon, Letter Bureau of Reclamation to Macri dated October 6, 1944, was marked Defendant Macri's Exhibit No. 40 for identification.) [392]

Q. Handing you what has been marked Macri's 40 for identification, do you have a copy of a letter of October 6 from the Bureau addressed to Macri, shown as having been sent you? Will you look in your file please, Mr. Schaefer?

Mr. Olson: Well, I'd suggest, your Honor, that I'm going to object to the introduction of this evidence, and before we have a copy of it——

Mr. Holman: Well, I want him to check to see if he has a copy, Mr. Olson. If he has, why——

The Court: What is the date of that?

Mr. Holman: October 6, your Honor, 1944.

Witness: No, I don't.

Mr. Olson: When you speak, speak out loud.

The Court: Yes.

(Testimony of M. C. Schaefer.)

Q. You do not have a copy?

A. I do not have a copy.

Q. Will you read the letter, and calling your attention specifically to the fact that the Bureau shows as transmitting a copy to you, tell me whether or not you did receive a copy of that letter?

A. Well, I wouldn't be able to swear to it, that we did or didn't.

Mr. Holman: Your Honor, I propose to offer this in evidence as binding upon the sub-contractor, since it [393] shows that a copy was transmitted, and the witness says he can't swear whether he got one or not, and it is marked as having sent a copy.

The Court: Do you offer it?

Mr. Holman: I do, your Honor.

Mr. Olson: I object, your Honor, on the ground it is wholly immaterial and irrelevant. It purports to be a demand on Macri Company for the Concrete Construction Company to furnish payroll. There is absolutely no issue made in this case whatsoever. If they are going to go into every little thing they contend Schaefer didn't do, or we contend Macri didn't do, we'll be here for a month. My point is it is wholly immaterial to whether we're entitled to damages against Macri or he's entitled to damages against us.

The Court: What is your contention?

Mr. Holman: I wanted to show, your Honor, that with reference to the Schaefer payrolls here for identification, the time of the first receipt by the government of any payrolls——

(Testimony of M. C. Schaefer.)

The Court: What have the payrolls to do with the issue?

Mr. Holman: Only to show the manpower, and so far as the government was concerned, as was testified, to show a proper compliance with the contract provision [394] with respect to wages, which is an obligation of the principal contractor, and therefore an obligation on the sub-contractor under the principal contract.

The Court: The matter of wages involved here, are they?

Mr. Holman: The matter of conduct of the job is, your Honor, and under payrolls I would like to indicate, if I may have the payroll, indicate to your Honor the only matter that is affected by this letter.

The Court: Well, we might shorten this a little. Is it your contention that this is evidence that Schaefer didn't furnish the payrolls?

Mr. Holman: Yes, sir.

The Court: You're using it as direct evidence?

Mr. Holman: Timely.

The Court: What's that?

Mr. Holman: I'm showing that he did not furnish the payrolls timely, as required by the contract.

The Court: Well, then the objection is sustained. It isn't competent evidence that he didn't furnish the payrolls. It is a letter written by somebody claiming he didn't.

Mr. Holman: Well, may I have the payrolls, then, your Honor? It may make it competent.

The Court: It would make it what? [395]

(Testimony of M. C. Schaefer.)

Mr. Holman: It would prove this letter.

The Court: The point I'm making, Mr. Holman, a letter written by somebody from the Bureau of Reclamation to Macri stating Mr. Schaefer didn't furnish certified copy of the payrolls is not competent evidence that he didn't. It isn't even competent as notice to Schaefer that it was mailed or received.

Mr. Holman: He says so.

The Court: You know better than that, Mr. Holman, the fact that he says it was mailed.

Mr. Holman: No, until I can get Mr. Nelson.

The Court: All right, the objection is sustained.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Now, with reference to Macri's identification 16, I call your attention to the first payroll on Concrete Construction Company, which is shown for the week of what, Mr. Schaefer?

A. Well—week ending March 15.

Q. March 15, 1944; and the verification on the bank, by you, on October 18, 1944; do you see that, before a notary public?

The Court: What identification is that?

Q. This is 16, your Honor. Do you see that, Mr. Schaefer? A. Yes.

Q. And then the stamp on the front, United States, Yakima, [396] Washington, received October 20, 1944? A. That's right.

(Testimony of M. C. Schaefer.)

Q. Now, I call your attention to the intermediate payrolls up to, just generally here, to save time, up to October 9, the week of October 9——

A. October 4.

Mr. Olson: If it will save any time, do you want to introduce those payrolls into evidence?

Q. No, that's not the purpose; and the stamp of the Bureau upon the payroll for October 4—I'll only go through October 4—the stamp of the Bureau, October 20, 1944, is it or is it not a fact that until after October 6, and the writing of the identification 40, that you furnished neither the Bureau nor the principal contractor with any payrolls?

Mr. Olson: That's objected to, if the Court please, that it is wholly immaterial when these payrolls were signed.

The Court: Sustained.

Mr. Holman: I would like a specific exception both as to that and to the non-admission of this letter, 40.

The Court: If you think you need an exception under the Civil Rules of procedure, I don't think you do, but you may have it for what it is worth.

Mr. Holman: Your Honor, I don't mean to do that, but it is a matter of old training under the old rules, and I'm sorry.

The Court: All right, let's proceed.

Q. I don't wish to offend by your Honor's ruling, and do not answer this question, Mr. Schaefer, but I want to clear this one point. Did you at any time furnish Macri and Company with any copies of your payrolls?

(Testimony of M. C. Schaefer.)

Mr. Olson: Did we furnish them to Maceri and Company?

Mr. Holman: Yes.

Mr. Olson: I object to that as being immaterial. I don't see how it affects the issue of this case. If I'm missing something, if counsel will point it out—

The Court: How does it?

Mr. Holman: Just the feel of the job, your Honor; here are two contractors operating——

The Court: I think we've got troubles enough without going into the feel of the job.

Mr. Holman: The feeling of the job——

The Court: That's not definite enough. If you can show me any definite purpose for this payroll, I'll reconsider my ruling. Come on, let's proceed with the cross-examination of this witness, Mr. Holman; you're taking too much time. [398]

Mr. Holman: May I suspend at this time, your Honor?

The Court: No, you may not; you may go ahead.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, you say it was March when you were first out to this area?

A. March of '44, yes.

Q. March of '44. Was the road frozen at that time?

A. Road frozen?

Q. Yes.

A. No.

Q. The ground was hard, was it not, in '44, in March?

A. No, I wouldn't say that.

(Testimony of M. C. Schaefer.)

Q. You wouldn't say that? It was soft? Well, was it wet?

A. I wouldn't say that it was wet.

Q. You don't remember what it was like?

A. I believe it was quite dry out there. In fact——

Q. Yes, that's what I'm getting at. It was quite dry and soft, isn't that right?

A. Well, it was soft, sure.

The Court: You'll have to speak up.

A. It is soft as compared with—it wasn't as soft as it was at times out there; I'd say it wasn't as solid as it was at times out there. [399]

Q. It gets softer as the summer progresses, doesn't it? A. It gets softer the drier it gets.

Q. And you were there in March, and you first started on the job in July? A. No.

Q. You first started pouring?

A. We first started pouring.

Q. The 30th or 31st of July?

A. The last day of July, yes.

Q. That's when you started pouring. Now, what sort of a truck was this you carried this Mixomobile on? A. A Ford truck.

Q. And what tonnage was that?

A. The tonnage on that I believe I stated——

Q. On the truck?

A. Well, the truck and the mixer is one combination; it's a manufactured combination.

Q. It is a unit? A. It is a unit.

Q. And the whole thing weighs 11 tons?

(Testimony of M. C. Schaefer.)

A. Well, that's what I thought it was, but since I've checked with one of my men here, and he says that that would be——

Mr. Holman: Just a minute; may it please the Court, I object to a conversation between him and his men. [400]

The Court: Yes, that's sustained. You can't tell what the conversation was.

Witness: ——and they told me——

Mr. Olson: The Court says you can't tell what he told you. If you wish to correct your previous estimate I'm sure you may do so.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Just tell us what it weighs now.

A. About 9 tons.

Q. Is that loaded or unloaded?

A. That is unloaded.

Q. And how much tonnage do you have when it is loaded?

A. Well, it is at the station at the time it is loaded.

Q. Well, I don't care about that. How much does it weigh when it is loaded?

A. Well, about another two ton; that's with a one-yard batch, and that's what we were using, and a two-yard batch, why, it would have about four ton of concrete.

Q. In other words, it would vary between 11 and 13 tons loaded, is that right? A. Yes.

(Testimony of M. C. Schaefer.)

Q. Didn't you anticipate some difficulty moving that vehicle around loaded with cement, when you were out there in March?

A. It wasn't so much that we were driving around there with [401] that vehicle loaded; I did anticipate——

Q. Just a moment, now. I wish the Court would instruct this witness to answer my questions. Now, they're perfectly simple; even I understand them, and I think this witness shouldn't have any trouble; he's a big contractor.

The Court: No remarks, Mr. Hawkins. Read the question, Mr. Taylor.

(Whereupon, the reporter read the last previous question.)

The Court: Just answer the questions directly, Mr. Schaefer.

A. Yes, I did.

Q. Now, Mr. Schaefer, did you ever have any dealings with Mr. Goerig or Mr. Philp?

A. I did not.

Q. In fact, you knew—in fact, you did not know that they had any connection——

Mr. Holman: Just a minute. Objected to for the purpose of law as immaterial, irrelevant, outside the issue, a contract between the parties——

The Court: Well, I'll overrule it. The legal effect would be considered.

Mr. Olson: I would like for the record to join in the objection.

The Court: All right. [402]

(Testimony of M. C. Schaefer.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. You did not know at any time prior to the time that you started this suit that either Mr. Goerig or Mr. Philp had any connection with either of these projects, isn't that right?

A. That is correct.

Q. And it was not until after you filed your first complaint in these actions that you learned for the first time that Goerig or Philp might have some connection with these jobs?

Mr. Holman: Same objection.

Mr. Olson: Same objection.

The Court: Overruled.

Q. What is the answer?

A. That is correct.

Mr. Hawkins: I have no further questions, your Honor.

The Court: Mr. Ivy, do you have any questions?

Mr. Ivy: Yes, I do, your Honor.

The Court: All right.

Cross-Examination

By Mr. Ivy:

Q. Mr. Schaefer, you stated that April 29 was the first meeting with Macri on the job?

A. That is—I've met Mr. Macri on the job before, for purpose of complaining about the excavation, but not as to [403] the meeting at which we had more of a meeting.

(Testimony of M. C. Schaefer.)

Q. When was the first meeting at which you told him he must do certain things for you to continue on the job?

A. Oh, we talked about—that is, as to my saying that we wouldn't continue on the job unless he did certain things?

Q. That's right.

A. No, that was the first time.

Q. That was April 29? A. Yes.

Q. Now, have you made a segregation of your costs prior to April 29 and subsequent to April 29 on 1062?

A. We have them by months. I have it listed, the expenses——

Mr. Olson: I might state to counsel that I intend, with your Honor's permission, to put Mr. Schaefer back on the stand at the close of the case, with reference to the cost items; is that what you're getting at?

Mr. Ivy: That's right.

Mr. Olson: And that will be available at that time, if that is agreeable to you, Mr. Ivy.

Mr. Ivy: And having particular reference to the Surety Company's position in the case, your Honor.

The Court: Yes.

Mr. Ivy: So as I understand it, then, Mr. Olson, you will before the case is over have a segregation made?

Mr. Olson: I'm going to put Mr. Schaefer on the [404] stand at the close of my case to testify as to his costs, at which time you can cross-examine him

(Testimony of M. C. Schaefer.)

as to what the items are for, and also have a C.P.A. who's went over the payrolls, over the entire expenses, who will also be available for cross-examination.

Mr. Ivy: On that basis, your Honor, I'll not direct any questions to the specific items.

Cross-Examination

(Continued)

By Mr. Ivy:

Q. Your next main meeting on the job with Mr. Macri was June 15, is that correct? A. Yes.

Q. At that time you again, did you not, state that you would not continue unless he did certain things? A. That's right.

Q. What were the things that you were requiring him to do in order for you to continue?

A. To change his method of excavation, and to do his own excavating instead of forcing it on us to do.

Q. You then did a certain amount of excavating not required by the contract?

A. That's right.

Q. And you have the cost of that segregated, do you? A. No.

Q. Now, what other matters were you requiring Mr. Macri to do in order for you to stay? [405]

A. For him to supply lumber, and to not only do the excavating according to specifications, but to get on with the excavation so we could make some progress in our work.

(Testimony of M. C. Schaefer.)

Q. You complained of his delay?

A. That's right.

Q. And what else, Mr. Schaefer?

A. Well, there was his general excavating, the hand excavating, and fine grading, the lumber, and the slowness of his progress in doing that work and supplying the lumber.

Q. And those were all matters required of him under his contract and under the sub-contract with you?

A. That's correct.

Q. And are those the matters complained of in your first cause of action, Mr. Schaefer?

A. Yes.

Q. Making up the amount asked for in your first cause of action?

A. That's right.

Q. And are they also the amounts asked for in your second cause of action, making up the alternate cause?

Mr. Olson: Your Honor, I think the pleading answers that pretty well. Frankly, I prepared the pleadings; Mr. Schaefer didn't.

The Court: Yes, he might not know specifically what is contained in his cause of action. If you don't [406] know, you can say so.

Witness: I don't get that.

Q. You don't know? That's all.

Redirect Examination

By Mr. Olson:

Q. Mr. Schaefer, the question asked you about lumber; with reference to the sub-contract what did

(Testimony of M. C. Schaefer.)

Mr. Macri tell you about lumber and his ability to get lumber?

A. He said he'd have no problem in supplying lumber.

Q. Did he say why?

A. He had an interest in a lumber mill.

Q. Is there anything else he said about supplying the lumber, the time he could supply it?

A. He says "You'll have plenty of lumber; you don't have to worry about anything".

Q. Now, with reference to the road situation, counsel went into that, what was said by Mr. Macri to you in connection with the roads, and approximately when was it said, with reference to whether made before or after the contract?

A. Well, before we signed the contract we talked to him about the roads, before we submitted our figure on the job, and he said we didn't have to worry about the roads, that they had to get in there to do their own work, and that the roads would be satisfactory. He said "You won't have any trouble on the roads" and then after we signed the contract, and previous to submitting a figure on [407] 1068 we went over the site on job 2, and at that time was riding in Mr. Nelson's, that's Harold Nelson of the Bureau of Reclamation, car, Mr. Macri, brother William E. Schaefer, Harold Nelson, and myself, and brother Bill asked him about the road situation, and he said "Well, that will be the same as on job 1 there, you don't have anything to do with the roads, that's our item, we take care of the

(Testimony of M. C. Schaefer.)

roads. You won't have any trouble; we've got to get in there with our own equipment, to do our work, and you won't have any difficulty."

Q. When was that you're talking about, 1068, with reference to whether you had then started performing 1062 or not, Mr. Schaefer?

A. We had been working in the yard on 1062.

Q. Well, you were working in the yard; had you been out on the field yet, pouring concrete, at this time?

A. No, we weren't pouring any concrete. We may have been setting forms. I wouldn't—I don't think we were setting forms at that time.

Q. When was it with reference to the date that the sub-contract bears on 1068? Was it before that time, or after it?

A. It was before we signed the contract on 1068.

Q. Now, Mr. Schaefer, did you complete the installation of all concrete structures on job 1062?

A. We did.

Q. And do you know the date that you completed that work?

Mr. Hawkins: Your Honor, I submit this is not proper redirect examination.

Mr. Holman: I join, your Honor, and I also object it is not the best evidence. The government record is the best evidence.

The Court: Overruled.

A. I believe it was April 8 that the last man pulled off the job and come back to Portland.

Mr. Holman: I move that be stricken, your Honor. It is not responsive.

(Testimony of M. C. Schaefer.)

Mr. Olson: I asked when he finished it.

The Court: I understood him to say April 8 was the date of finishing, is that right?

A. It was the day before that; it would be the 7th that they finished, and then they came in on the 8th. They probably picked up a few tools at the job site on the 8th.

Q. Then the answer to the question is you finished on April 7? A. That's right, yes.

Mr. Olson: That's all, subject to recalling Mr. Schaefer on the amounts.

The Court: We'll suspend now until 1:30. You'll have a chance for re-cross then. [409]

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, February 26, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Olson: Had I finished before lunch?

The Court: I think you had. If you have any further questions, however, you may ask them, on redirect.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Yes, there was one thing. Counsel for Philp and Goerig asked you, Mr. Schaefer, about moving

(Testimony of M. C. Schaefer.)

the mixer loaded with cement. Would you just explain what was the situation with reference to moving the mixer when it was loaded with cement?

Mr. Hawkins: Your Honor, I object to that question. I don't think that relates to the nature of my examination. I was merely asking him about the weight of the vehicle, not how he moved it around. I don't think it is proper redirect.

The Court: I thought there was some matter gone into as to the difficulty of moving the mixer loaded on the roads, is that correct? I'll overrule the objection.

Witness: The mixer wasn't loaded when it was moved about from structure to structure. The maximum amount [410] of concrete in the mixer when moving from one structure to another was perhaps half a yard of concrete. It was not a loaded mixer.

Q. Mr. Schaefer, you referred to certain pictures taken of some lumber. Do you have those with you? A. I have.

Mr. Hawkins: Your Honor, I again object. I don't think this is proper redirect.

The Court: I don't think it is, but if you wish to re-open your direct and put in these pictures, I'll consider that.

Mr. Olson: I move to re-open.

The Court: Yes, all right.

Mr. Olson: I'm not anxious that they be marked separately. If there is any way they can be marked otherwise, I think they all relate to lumber; if you want to give them one exhibit and then a sub-letter under each one.

(Testimony of M. C. Schaefer.)

The Clerk: You don't want them fastened together?

Mr. Olson: Well, if they can be stapled together I have no objection to that.

The Court: And I assume that they all are of the same character, that is, they are pictures of lumber?

Mr. Olson: Yes.

(Whereupon, six photos of lumber, taken September 22, [411] 1944, were marked Plaintiff's Exhibit No. 41 for identification.)

Redirect Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, showing you plaintiff's identification 41, consisting of six pictures, just state first what they are, without going into any detail, just what they are—I'll withdraw that. Did you take those pictures, Mr. Schaefer? A. I did.

Q. Yourself? A. That's right.

Q. And on what date?

A. On September 22, 1944.

Q. And whereabouts did you take them?

A. At the yard site of job 1062.

Q. And what did you take a picture of?

A. I took a picture of lumber; the lumber—

Mr. Holman: Just a minute, your Honor. I submit the pictures would be the best evidence.

Q. Well, I assume he's trying to show they're pictures of something involved in this action. What lumber is it, Mr. Schaefer?

(Testimony of M. C. Schaefer.)

A. It is of the used lumber that Macri Company supplied us on the job, and there's one picture——

The Court: Perhaps you had better let your counsel [412] ask the question, rather than volunteer.

Q. Directing your attention to the second picture from the top of this group that is stapled together on plaintiff's identification 41, I'll ask you what that picture was taken of.

A. That picture indicates——

Mr. Holman: Just a minute.

Q. Never mind what it indicates. Just what is it taken of?

A. It is taken of lumber that—or a vacant space where lumber would normally be for our use.

Mr. Holman: I move that that latter part be stricken, your Honor.

The Court: Go ahead. This is all preliminary to the offer of the pictures, I assume.

Mr. Holman: The only objection I had, your Honor, was "where lumber normally would be." I think that is volunteered.

Q. Mr. Schaefer, you mentioned that the pictures in general were pictures of used lumber that was furnished? A. That's right.

Q. Now, directing your attention to the second picture of this group, is that a picture of the used lumber, or is it a picture of something else?

A. That's a picture of other lumber, I believe that belonged to Macri or the Bureau, but was not for our use. [413]

(Testimony of M. C. Schaefer.)

The Court: Is that identified in any way, separately?

Mr. Olson: As the second picture, your Honor, in the group.

The Court: Second in the group; yes, I see.

Mr. Hawkins: We have no objection to that, your Honor. I notice some of these pictures are color. Is that actually the case, or were they tinted up?

Witness: No, that there was taken with a colored film.

Mr. Holman: We have no objection to the introduction of the pictures as speaking for themselves. We do object to the testimony volunteered by the witness with respect to them, your Honor.

The Court: Well, that will be stricken, and it would seem to me the second picture would be subject to objection. Of course, none is made. Didn't he say that was lumber that belonged to somebody else?

Mr. Olson: Well, I'll interrogate about that, because if it's not this lumber, I don't want it.

Mr. Hawkins: We have no objection. What it is is a picture of a space between two piles, and I think he testified that was where his lumber should have been.

The Court: I don't think that would be competent evidence of a failure to furnish lumber, but you may inquire further. [414]

(Testimony of M. C. Schaefer.)

Redirect Examination

(Continued)

By Mr. Olson:

Q. Can you explain, Mr. Schaefer, what the second picture of identification 41 is supposed to show?

A. It shows that there were no two by fours on the job.

Mr. Hawkins: Just a moment. I move that answer be stricken. I think the picture speaks for itself.

The Court: Yes, that will be stricken.

Mr. Olson: I'll follow that up.

Q. There are, I believe, Mr. Schaefer, some two by fours in that picture. Were those two by fours there for your use?

Mr. Holman: I object to that, your Honor, as testifying on the picture. The witness can testify off the picture, as to facts.

The Court: I think he's trying to show what the picture shows, to determine whether it is admissible. I'll overrule the objection.

Q. You may answer.

A. They were two by threes.

Q. I'll ask you, Mr. Schaefer, if the blank space on this picture, between the two piles of lumber, is the space where Mr. Macri placed the two by fours that he furnished you for use on this job?

A. Yes.

(Testimony of M. C. Schaefer.)

Q. And were there any two by fours on the yard at any other [415] place other than this on September 22? A. No, there was not.

The Court: Is there any objection now?

Mr. Holman: I think not, your Honor. The pictures speak for themselves.

The Court: Well, we'll admit them.

(Whereupon, plaintiff's Exhibit No. 41 for identification was admitted in evidence.)

The Court: All right, recross, and also cross on this new direct.

Recross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, how many thousands of board feet of lumber were furnished out on this job?

A. Excuse me?

Q. How many thousands of board feet of lumber were furnished on this job?

A. I do not know.

Q. Would it be in excess of two hundred thousand board feet? A. No, I wouldn't say so.

Q. Would it be in excess of one hundred thousand board feet? A. I wouldn't say so.

Q. The truth is, you just don't remember?

A. Well, we had no tally on the lumber that was delivered. They never gave us a tally on it.

Mr. Holman: Could you speak up? [416]

A. They never gave us a tally on the lumber.

(Testimony of M. C. Schaefer.)

Q. Now, then, the lumber shown on these pictures which have just been admitted amounts only to 20 or 30 board feet, does it not, sir?

A. No, there's more than 20 or 30 board feet on those pictures.

Q. About how much, about 100?

A. I never give it an idea at all, as to how many board feet there are shown on there. Just as a guess, there would probably be 300 board feet.

Q. About 300 board feet?

A. My understanding was that there were about 5000 feet delivered.

Mr. Holman: May I have that answer?

(Whereupon the reporter read the last previous answer.)

Mr. Olson: What do you mean by that, Mr. Schaefer?

A. 5000 feet of that type of lumber.

Mr. Holman: I move that answer be stricken, your Honor. It is quite ostensibly based on hearsay.

The Court: Well, counsel asked him if he knew how much lumber was furnished, and he's given his best estimate.

Mr. Holman: For the entire job, and he says about 5000 feet of this kind. That I submit is not a proper [417] responsive answer.

Mr. Olson: They then came back and said if this wasn't a small part of it, and he said there was about 5000 feet of this type of lumber.

The Court: Well, I'll permit the answer to stand.

(Testimony of M. C. Schaefer.)

Recross-Examination

(Continued)

By Mr. Hawkins:

Q. As I understand your testimony, there was about 5000 board feet of lumber of this kind shown in these pictures delivered on the job; that's your guess? A. That is right.

Q. And you do not know what the total amount of lumber was? A. No, I do not.

Q. And you wouldn't hazard a guess as to that, although you're able to guess as to this type of lumber?

A. That is taken from the record, I believe; that's my idea of the 5000 feet, comes from the record of the daily report.

Q. That was made to you?

A. That was made to me, yes.

Q. But you have no idea of the total amount? Let's get that point clear.

A. No, there was never any figure shown on the daily report.

Q. It might exceed 150,000, for all you're able to tell right now? A. That's right. [418]

Mr. Hawkins: That's all.

Recross-Examination

By Mr. Holman:

Q. Did you have an estimate, Mr. Schaefer, of the amount of lumber required for the forms on this job?

A. No, I never made out a full estimate.

(Testimony of M. C. Schaefer.)

Q. Never made an estimate. Did you talk over with Mr. Macri the quantity of lumber required for forms for this job?

A. No, only as far as stating that when he asked me how much I had figured or would figure for lumber, I told him that was about \$4.00 a yard.

Q. About—

A. \$4.00 per—figured on the yardage basis; that is the basis on which our figure went in there, at \$26.00.

Q. Wait a minute. You mean you figured out of your \$26.00, \$4.00 was for lumber?

A. No, that was above the \$26.00.

Q. In other words, if you furnished the lumber it would have been \$30.00?

A. Well, there were other figures at that time, which would have included a certain profit on that lumber, and so forth, but when we talked about the lumber. I told Mr. Macri I didn't want anything to do with the lumber. He said "You don't need to." He said, "How much did you figure in there, or how much did you figure you would [419] have to have on lumber?" I said about \$4.00 a yard.

Q. That means \$4.00 per cubic yard of the concrete structure excavation, item 12?

A. Of the concrete, which according to the specification was 1515 yards.

Q. Item 12, sir?

A. Well, I wouldn't be able to say whether it was item 12, unless I looked at the specs.

Mr. Olson: Well, I think it is item 12.

(Testimony of M. C. Schaefer.)

A. Well, if the concrete for structure is item 12, that's it.

Mr. Olson: I submit, your Honor, the specifications will show that. A. That's right.

Q. Then your answer is that you were talking on that with respect to item 12, right?

A. That's right.

Q. So that if there was 5000 feet of this kind of lumber as shown by those photographs, it is your contention that there was about \$20.00 of inferior lumber, is that right? I mean you were damaged 5000 feet times \$4.00 a thousand, weren't you?

A. This lumber here is just an indication of the poorest lumber that we had on the job. There was other——

Q. You said—go ahead, sir. [420]

A. There was other lumber from good to bad, and this was the worst.

Q. But I say that this is a \$20.00 item so far as your original figuring was concerned?

A. I don't know how much Mr. Macri paid for this lumber. If it is 5000 feet of lumber, you're not buying it for \$4.00 a thousand. It can't be \$20.00.

Q. You had it figured at \$4.00 a thousand as cost to you, did you not?

A. \$4.00 a yard of concrete.

Q. \$4.00 a yard of concrete?

A. That's right.

Q. And how many thousand feet would go in a yard of concrete; would be used in a yard of concrete? How many feet, about, for a yard of concrete?

(Testimony of M. C. Schaefer.)

A. To place a yard of concrete would probably average, in the form as set, would probably take 150 board feet.

A. To pour one yard of concrete.

Mr. Holman: Very well, that's all.

The Court: Do you have any questions, Mr. Ivy?

Mr. Ivy: No questions, your Honor.

The Court: Any further questions from this witness? Call the next witness, then. [421]

PATRICK L. DARCY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please?

A. Patrick L. Darcy.

Q. Where do you reside?

A. Portland, Oregon.

Q. By whom are you employed?

A. Concrete Construction Company.

Q. Now, with reference to specifications 1062 of the Bureau of Reclamation project, Roza Division, what if any connection did you have with that job?

A. I was superintendent of all operations on that job from the 10th of August until the finish of the job.

Q. Would you give the year, Mr. Darcy?

A. 1944-'45.

(Testimony of Patrick L. Darcy.)

Q. You went on the job, then, on what date?

A. I started first on that job the 29th of June, '44.

Q. What experience have you had, Mr. Darcy, in construction work, particularly concrete construction work, excavation work, work of that kind, and over what period of time?

A. Well, general construction of concrete, general construction altogether, building, including concrete dam [422] work, bridge work, everything of a concrete nature, over a period of about twenty-two or three years.

Q. And in connection with that experience are you able to—have you had to do it and are you able to figure elevations and sub-grades?

A. Most assuredly.

Q. And was that a part of your work in connection with specifications 1062? A. Yes.

Q. Now, showing you, Mr. Darcy, plaintiff's identification 22, I'll ask you to state what that is, if you can?

A. As it is assembled it is a complete location area map of the project 1062 of the Roza Division.

Q. And the tail end of the map or whatever it is, that's overlapping underneath, what is that?

A. This is a two section plan of the area, and this is the overlap of each section on the area, which has been turned back with a division line across the center, taped to crease.

(Testimony of Patrick L. Darcy.)

Q. Do we understand, then, that this part that is underneath that map could be detached, disregarded, and have no reference to the map itself?

A. That's right.

Mr. Olson: Do you want that detached?

Mr. Holman: I don't care. [423]

Q. Now, there are certain figures on this identification 22. Would you explain what those are, Mr. Darcy? A. Well, these read—do you—

Q. Did you put those on?

A. I did; I put all these marks on here, that aren't on a blue print of the Bureau's reproduction. The red dots is the structure locations, and the pencil marks in numbers are the structure numbers of the structure at that location.

Q. Now, is there another number that is a part of the blue print itself? A. There are.

Q. And what are those numbers?

A. They are the designation of the laterals and stations.

Q. Designation of the laterals and stations; and who furnished you with the blue print itself?

A. This was furnished by the Bureau of Reclamation.

Q. And in connection with what job?

A. 1062, for the purpose of locating the structures.

Q. Now, Mr. Darcy, the stations that you refer to, how does that tie in with the other Bureau of Reclamation records, and particularly the structure lay-out plan?

(Testimony of Patrick L. Darcy.)

A. Well, each structure lay-out plan has a station marked on it, designating which station on the location map that that is to go to, and the corresponding station mark is [424] on this map.

Q. I wonder, Mr. Darcy, handing you plaintiff's Exhibit 12, if you could just show the Court the marking on these that is the station mark?

A. On Lateral 59.3 on the structure lay-out plan the station mark would be 5 plus 00.

Q. Now, would that station mark also appear on the location map?

A. Not as a number; as a point.

Q. Well, do they generally, Mr. Darcy—the station marks on the structure lay-out plans, do they also appear as a station number on your location map, or not? A. Not as numbers.

Q. All right; then how do you find out from the structure lay-out plan where that particular structure would go, on the map?

A. By the designation of markings which are shown on a code up in this corner.

Q. When you say "up in this corner" you're referring to plaintiff's identification 22?

A. Right there. There's a key mark showing a code of location and type of structure on the lateral, all the way through.

Mr. Olson: We re-offer our identification 22 in evidence. [425]

Mr. Holman: May I see this code on here?

Q. Now, the code mark, are you referring to what appears under "Explanation?"

A. Explanation.

(Testimony of Patrick L. Darcy.)

Q. And who put that on the map?

A. That is Bureau data.

Q. Bureau of Reclamation?

A. Bureau of Reclamation data.

Mr. Holman: May I ask a question, your Honor?

The Court: Yes.

Q. (By Mr. Holman): Mr. Darcy, do I understand that each structure is numbered on this the same as in the lay-out plan; you have, in other words, structure number so and so marked on here as structure number so and so?

A. That's right.

Q. You have on this in several places by irregular lines in red and the word "eliminated"; that is an indication of revisions as shown on the lay-out, is it not? In other words, if they eliminate a structure, or revise it?

A. That will be found on structure lay-out plans in here, as a cross across the plan, marked "eliminated."

Q. (By Mr. Olson): This relates to 1062 only? Counsel was just asking me.

A. Only. [426]

Mr. Holman: Without admitting the correctness of the location, your Honor, there is no objection to the map as supporting the witness' testimony, in support of his testimony.

The Court: Do you have any objection, Mr. Hawkins, to the offer of this map?

Mr. Hawkins: No, your Honor; no objection.

(Testimony of Patrick L. Darcy.)

The Court: It will be admitted for the purpose of illustrating the testimony of this and other witnesses.

(Whereupon, Plaintiff's Exhibit No. 22 for identification was admitted in evidence.)

Mr. Olson: Counsel will stipulate that the overhand there that has nothing to do with it, on the back, may be detached by the clerk.

The Court: Yes, I was going to suggest that. It certainly would be less confusing to the appellate court.

Mr. Holman: Yes, I think it should be cut off.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Darcy, are the stations as designated on Exhibit 22 correctly located on that location map?

A. Yes, they are.

(Whereupon, Map showing relation in location of specifications 1062 and 1068 was marked Plaintiff's Exhibit No. 42 for identification.)

Q. Now, Mr. Darcy, showing you plaintiff's identification [427] 42, I will ask you what that is?

Mr. Holman: Mr. Olson, for the purpose of saving time, if it is the same thing as the other job——

Mr. Olson: I'll show it to counsel, then. The only purpose of this map is to show the location of 1068 with reference to 1062.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I have no objection, your Honor.

The Court: Mr. Hawkins, have you seen this map?

Mr. Hawkins: Yes, I've examined it. There is no objection.

The Court: Mr. Ivy, I haven't mentioned you. If you should have any objection, just speak up, and I won't ask you each time. Admitted.

(Whereupon, Plaintiff's Exhibit No. 42 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, would you step down to plaintiff's identifications 23, 24, 25, and 26?

Mr. Holman: May I ask one question about 42 before that? You said it would show the relative positions of 1062 and 1068. Do you mean 1062, 1 and 2, and 1068?

A. 1068 is number 2, as you've been speaking of it.

Mr. Holman: There are two schedules in 1062; are they both shown on that? [428]

A. That is just a general area map. That is the Roza Division.

Mr. Holman: That is the whole of 1062, then, shown on that?

A. Yes.

(Testimony of Patrick L. Darcy.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Darcy, referring first to plaintiff's identification 23, I'll ask you first who prepared that?

A. I did.

Q. Will you then relate what that identification is?

A. That is an assembly of a structure placed in a correct excavation as designated by the specifications.

Q. Excuse me——

Mr. Holman: I move that answer be stricken as a conclusion of the witness.

The Court: All right; stricken.

Q. Directing your attention to identification 23, Mr. Darcy, that specific identification consists only of the box model, and does not include the structure. The structure in the center is a separate exhibit. Now, I'll ask you again to state, Mr. Darcy, what plaintiff's identification 23 is.

A. That is an excavation model; the model of an excavation as required by specifications.

Mr. Holman: I move that be stricken, your Honor. [429]

The Court: Overruled.

Q. Can you tell us which structure that is a model of?

A. That was taken of 427-428, a double structure, road crossing outlet.

(Testimony of Patrick L. Darcy.)

Q. Now, would you just proceed, Mr. Darcy? Well, first, the banks on that structure as prepared by you are to what slope? A. One to one.

Q. And the lateral excavation with reference to the distance laterally from the outside of the structure is to what distance? A. One foot out.

Q. I'll ask you first, is that prepared to scale?

A. That is prepared to scale.

Q. And to what scale?

A. 15/100 of actual size; 15/100 of one foot to a foot; 15/100 of a foot against a foot of actual size.

Mr. Olson: We offer plaintiff's identification 23 in evidence.

Mr. Holman: I object to it, your Honor, for the same reasons as previously urged in the record, that the specifications do not require a slope of one to one, nor does the sub-contract, or is it a matter determinative, other than by the court as a matter of law; the one to one slope does not control. [430]

The Court: Any further objections?

Mr. Hawkins: No further objections.

The Court: Overruled; it will be admitted.

(Whereupon, Plaintiff's Exhibit No. 23 for identification was admitted in evidence.)

(Testimony of Patrick L. Darcy.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, if you will refer to plaintiff's identification 24, I will ask you to state what that is? Well, first, I'll ask you who prepared that? A. I did.

Q. And to what scale is that prepared?

A. The same scale, 15/100 of actual size.

Q. And what is it?

A. It is a model of the structure 427-428, on project 1062.

Q. The wood portion of that identification 24 is what? What does it show?

A. You mean this part out here?

Q. Yes, the wooden portions.

A. That represents the forms that held the concrete.

Q. And the gray portion in between the wooden form is what—indication of what?

A. It represents the concrete we poured in the form for the structure.

Q. And plaintiff's identification 24 has what reference, if any, to plaintiff's Exhibit 23? [431]

A. This was made to go in that portion of the exhibit, as a complete unit of a structure in an excavation.

Mr. Olson: We offer plaintiff's identification 24 in evidence.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I would like to ask a question if I may, your Honor.

The Court: All right.

Mr. Holman: Is this a correct representation of the structure as poured by the Concrete Construction Company at that station?

A. That's right.

Mr. Holman: For the purpose of the record I take it I don't have to repeat, your Honor. Same objection.

The Court: Same objection you had to the other? The record may show that.

Mr. Holman: It would go to all four.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 24 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, drawing your attention, referring now, Mr. Darcy, to plaintiff's identification 25, I will ask you who prepared that? A. I did.

Q. And to what scale? [432]

A. Same scale as the other, 15/100 of actual size.

Q. So that plaintiff's Exhibit 23 and plaintiff's identification 25 are to the same scale?

A. Same scale.

(Testimony of Patrick L. Darcy.)

Q. What is plaintiff's identification 25?

A. It is an exact representation of the excavation that we built a structure in on project 1062, Roza Division.

Q. And which structure does that refer to?

A. Number 427-428.

Mr. Holman: Same ones as the other?

A. Same as the other.

Mr. Olson: We offer plaintiff's identification 25 in evidence.

Mr. Holman: Same objection, your Honor.

The Court: Identification 25 will be admitted for the purpose of illustrating the testimony of the witness, or any others that may testify to the facts of this structure.

(Whereupon, Plaintiff's Exhibit No. 25 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Darcy, I notice certain humps on Exhibit 25 that are not present around the excavation on Exhibit 23. Could you just explain what those humps or elevations are?

A. That represents the dirt excavated from the excavation [433] here and thrown out on the banks, as it was at that excavation.

Q. Did you take those measurements yourself?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Drawing your attention now to plaintiff's identification 26, I'll ask you what that is; or first, who made it? A. I did.

Mr. Holman: May I ask a question, just general, with reference to 23; that was without a similar showing. In other words, it was not made from the ground? A. No.

Mr. Holman: I understand; I just wanted to get that so I understood it.

Direct Examination
(Continued)

By Mr. Olson:

Q. Who made plaintiff's identification 26?

A. I did.

Q. And to what scale, if it is to scale?

A. 15/100 of actual size.

Q. Would you explain, Mr. Darcy, plaintiff's identification 26 with reference to plaintiff's Exhibit 24, if there is any difference?

A. Exact duplicate.

Q. The identification 26 is made—what connection, if any, does plaintiff's identification 26 have with plaintiff's Exhibit 25? [434]

A. It was made to fit in here, to represent a completed structure in an excavation.

Q. Now, are the paneling or the wood portions of identification—well, I'll withdraw that, and offer plaintiff's identification 26 in evidence.

Mr. Holman: Same objection, your Honor.

The Court: It will be admitted.

(Testimony of Patrick L. Darcy.)

(Whereupon, Plaintiff's Exhibit No. 26 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, are the panels or the wood portions of plaintiff's Exhibit 26 identical with the wood portions of plaintiff's Exhibit 24?

A. Yes, with one variation.

Q. And would you explain to the Court that variation, and show it to the Court?

A. On these two pair of strong-backs, they had to be a little bit different to fit the excavation.

Q. Just explain it to the Court, and why this structure is different from the other one.

A. The reason being for those shaped as they are, the carpenters had to chop the end of the strong-backs to get them in against the form, between the form and the bank, to get clearance from the bank, so they could be put in there to tie the forms together for the pouring of the [435] concrete.

Q. And was that done on the structure form itself, as installed on the job in that particular structure, to which plaintiff's Exhibit 25 and 26 relate?

A. They were.

Q. Now, Mr. Darcy, if you would take plaintiff's Exhibit 24, would you explain to the court

(Testimony of Patrick L. Darcy.)

and into the record just what that structure is, and what it does with reference to any weirs or gates?

A. This is a standard outlet with delivery for a road crossing, the road being as through there. This is the tile that comes from the outlet structure across the road.

Q. You are referring to a model concrete tile at the bottom of the structure?

A. Comes into this section here, is disbursed through a gate at this section, to weir out through here, weir being a measure for delivery, and what isn't weired out to this section of ground here continues on down the main lateral here.

Q. Now, on an actual panel, what type of lumber would be used in making those panels, and when you give the type of lumber, I'm not asking for grade, but the type of lumber, dimensions, point it out on this exhibit.

A. Two by fours would be used for plates and studs, strong-backs, supports, and corner blocking; one by eight ship-lap [436] used for sheeting on the outside panels of all structures except for the boxes and the exact interior of a structure, which are faced over the one by eight ship-lap sheeting with ply-wood.

Q. Show the ply-wood; and why was it used?

A. The ply-wood is indicated by the small line separation, the ship-lap by this line separation. That is used on the inside for facing to give a finished face when those forms are stripped off, and

(Testimony of Patrick L. Darcy.)

due to the necessity of having smooth surfaces to make the proper flow in regards to the planned hydraulics of this system.

Q. Now, I notice on this structure, plaintiff's identification 24—Exhibit 24, these little blocks with V-shaped markings on them. Would you explain that to the Court?

A. When the forms are stripped off the structure those blocks are stripped off over there and leave a key-way, for a plank, usually two by twelve, to drop down into this section, to control the flow to whatever is required to this section.

Q. Now, Mr. Darcy, I notice that there is one such wooden block that does not have the V-shaped marking, but which is wedged in, apparently, the other way. Would you explain that to the Court?

A. This block is put in the other way, into the concrete, with a bevel back into the concrete, so it can't come [437] out, for the purpose of screwing an enameled gauge plate on this at the crest elevation of the weir, corresponding to zero on the gauge plate, that measures accurately the water that goes through that weir.

Q. Now, directing your attention to Exhibit 23, Plaintiff's Exhibit 23, are there any portions of that that would be referred to as neat line, as that term has been used? A. This is a neat cut.

Q. You're referring to vertical cuts on the inside of the excavation?

A. Yes. This is a neat cut here. These are neat cuts in these sections here.

(Testimony of Patrick L. Darcy.)

Q. And those are for what part of the structure?

A. These here serve the purpose of preventing underwash.

Q. What goes in there?

A. This is concrete; concrete is poured into this, into this undisturbed dirt, to prevent wash back under the structure.

Mr. Holman: That's what they call a head wall?

A. No, that's a sub-wall, or sub-wall trench, there.

The Court: Where is the head wall?

A. This is the head wall of this particular structure; the head of the structure, as pertaining to the flow of the water, where the water first reaches the structure, being designated as the head wall.

Q. Now, referring to plaintiff's Exhibit 25, Mr. Darcy, is that—you testified, I believe, that that exhibit is made to scale of the actual excavation into which the structure was actually placed?

A. That's right.

Q. Does that represent the excavation as it was actually prepared when your carpenters got to that particular excavation?

A. No, it doesn't.

Q. And would you state in what particular?

A. Our carpenters got to the excavation as it was presented to us for the purpose of erecting forms. This neat cut was off square at an angle like this. This one was full on this side by six inches. This had to be cut off six inches to nothing. This had four to nothing. These sub-fillets were not cut out; these sub-trenches were not dug; this bank

(Testimony of Patrick L. Darcy.)

came in on a parallel with this bank; we had to take this all out to make room to get the form in.

Q. And whose employees made those additional excavations?

A. The Concrete Construction Company.

Q. Now, Mr. Darcy, would you insert the two structures, Exhibits 26 and 24, in their proper excavations?

(Whereupon, a model of a man was marked Plaintiff's Exhibit No. 43 for identification.)

Q. Mr. Darcy, showing you plaintiff's identification 43, I'll ask you what that is?

A. That is a clay replica of a man to scale, made to correspond with these demonstrations.

Q. What is the scale of that identification 43 with reference to Exhibits 23 to 26?

A. It is built on a scale of 15/100 of actual size of a man approximately five feet ten inches.

Q. So that these four exhibits, 23 to 26, and identification 43, assuming that the man represented by identification 43 is five feet ten, would be to the same scale, is that a true statement?

A. That's right.

Mr. Olson: We offer plaintiff's identification 43.

Mr. Holman: Let me see him.

Mr. Olson: Handle him with care!

Mr. Holman: No objection, as illustrative of the witness' testimony, your Honor.

The Court: It will be admitted for that purpose.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I'm about five feet ten myself, and I'm not sure it's correct.

Mr. Olson: Well, it's to show a comparison of this with the size of a man.

(Whereupon, Plaintiff's Exhibit [440] No. 43 for identification was admitted in evidence.

(Whereupon, a complete she-bolt set was marked Plaintiff's Exhibit No. 44 for identification.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Darcy, handing you plaintiff's identification 44, I'll ask you what that is?

A. A complete she-bolt set.

Q. Now, how do you spell that she, is it s-h-e?

A. She, that's right.

Q. Now, you say it is a complete she-bolt set. What, if anything, has it to do with the specifications 1062?

A. It's used for tying the inner and outer panels together, to keep them from spreading when the concrete is poured into them.

Q. Is that one that was actually used on the job?

A. Yes, this is from stock that was used on the job.

Q. And is it similar to that used in each of the structures?

(Testimony of Patrick L. Darcy.)

A. Yes, they were used repeatedly all the way through the project.

Mr. Olson: We offer plaintiff's identification 44 in evidence.

Mr. Hawkins: No objection.

Mr. Holman: No objection.

The Court: Admitted. [441]

(Whereupon, Plaintiff's Exhibit No. 44 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, handing you plaintiff's Exhibit 44, would you explain what relation it has, if any, to plaintiff's Exhibit 24?

A. There would have been used one of these sets at each one of these sets of strong-backs on all of these panels, completely through from the outside to the inside, all the way around, to tie that form together to receive concrete.

Q. Doesn't that leave a hole in the concrete?

A. It leaves a hole in the concrete where these two cones rest in there, and where that plugs goes through; those have to be filed.

Q. Now, illustrate to the Court the operations of that with reference to holding the form in place. I'm referring now to plaintiff's Exhibit 44.

A. This is the spreader part, two cones and a connector.

(Testimony of Patrick L. Darcy.)

Q. It's in the center?

A. It's in the center; that designates or controls the thickness of the concrete wall. These are screwed opposite for adjustment, and these are inserted through a hole in the wall between the strong-backs, and screwed up to a certain place.

Q. You're now referring to the round part?

A. Yes, the form being in about this area, and the strong-back from there to the plate, then the tension is taken up of the forms against these spreader cones here by this wedge. It makes a tight form at exactly the thickness the wall must be.

Q. Now, once that is in place and the concrete poured and set, so that the form is ready to be removed, what is done with reference to the she-bolt, plaintiff's Exhibit 44?

A. These wedges are driven back to loosen, and the plates snapped off, the strong-backs removed by turning out from under the plate, and these screwed out of the cones; then the form can be taken away from the concrete, leaving this in the face of the concrete, which has to be removed with a wrench made specially for the purpose. I haven't a wrench with me, but a wrench would fit in that hole and take the cones out, leaving a void in that wall.

Q. The same with reference to the other cones?

A. These are drove out.

Q. By "these" you're referring to what?

A. These connectors. After the cones are removed from both sides we usually drove these out

(Testimony of Patrick L. Darcy.)

from the hole, where they would come free. Where they didn't we left them in and closed the hole at the surface. [443]

Q. When the bolt was removed what was done with the hole left in the concrete?

A. That was filled entirely through the wall.

Q. With what? A. Grout.

Q. All right; now, would you explain, Mr. Darcy, and compare the removal of the she-bolt and panels with reference to the combination exhibits plaintiff's Exhibits 23 and 24, as against the combination Exhibit 25 and 26?

A. Compare?

Q. Compare the performance that you would go through. A. On this structure here?

Q. You're referring now to Exhibit 23 and 24.

A. A nail puller would be used to separate these panels here, where they're nailed together, and the she-bolts loosened and screwed out of these strong-backs; the strong-backs, nails would have been used in here, pulled by a hammer, and then this panel would drop away freely from the concrete and be removed from the hole.

Q. Referring now to 25 and 26?

A. This bank was so close here on this particular structure they were unable to get she-bolts in there. This was blocked on the bank and spreaders put inside the box to keep them from collapsing. She-bolts were used only out in these free portions here where they could be [444] reached and re-

(Testimony of Patrick L. Darcy.)

moved. Those two sets in the bottom had to be blocked. This one here we used she-bolt on it, where it could be reached.

Q. Now, what would be the situation with removing the panels themselves after the she-bolts or other blocking were removed?

A. These panels, we were unable to get them out without force.

Q. You're referring now to the outside forms?

A. This deep section, from this point over to this corner, were so tight in there from dirt having been broken off this sharp vertical bank and wedging down in behind, along with the blocks placed in there, they could not be taken out by hand, and had to have a cable tied around it and pulled out with a truck, which wrecked it, approximately a diamond shape, and destroyed the useability until that could be reconstructed. These panels back to here, these strong-backs, would be removed, and then what dirt was binding them around the bottom would be dug out to get those out.

Q. And who would do that excavating to remove those panels?

A. Well, the concrete crew, having no concrete to pour, stripped this particular structure, the various men in the crew.

Q. Whose crew? [445]

A. The Concrete Construction Company crew; the names I couldn't say without checking the time vouchers.

(Testimony of Patrick L. Darcy.)

Q. I don't care about that. Mr. Darcy, how does the excavation as indicated by plaintiff's Exhibit 25 compare in general with the total excavations that were made on the project by Macri and Company with reference to the subwalls and slopes on the bank, and so forth?

A. That is a very comparative example of all the excavations from beginning to end of the job.

Q. And why did you pick this particular one rather than any other, or is there any reason?

A. Yes; at the time it was decided this procedure would be necessary, this was the last one in progress of the work that hadn't been back filled, and it was near the road where it could be gotten to easily and checked; plain case of necessity, by an engineer.

Mr. Olson: While we're here, would the Clerk mark these panels for identification?

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 45 for identification.

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 46 for identification.

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 47 for identification. [446]

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 48 for identification.)

(Testimony of Patrick L. Darcy.)

Q. Before I get to these next identifications, Mr. Darcy, I think we should also ask you what is the approximate width of one of these outside panels, exclusive of what you term the strong-backs?

A. You mean thickness?

Q. Thickness, yes, that's what I should have asked you, thickness.

A. $4\frac{3}{8}$ inches, including 2 x 4 stud and 1 x 8 ship-lap sheeting.

Q. Now, these strong-backs you refer to, just point out what are the strong-backs.

A. These.

Q. And what function do they perform with reference to the form?

A. They bind across all the studs, to keep them in perfect alignment, so there will be no waver in the wall when the pressure goes on.

Q. And including the strong-back, how wide would that make the outer form panel?

A. Eight inches.

Mr. Holman: That would be eight inches over-all?

A. You've got two times $3\frac{5}{8}$, plus $\frac{3}{4}$. [447]

Mr. Holman: Pardon me; two times what?

A. $3\frac{5}{8}$.

Mr. Holman: I thought you said $4\frac{3}{8}$?

A. Including stud and ship-lap.

Q. Now, how much of plaintiff's Exhibit 44, being the she-bolt, would extend outward from this strong-back? A. Approximately $2\frac{1}{4}$ inches.

Q. $2\frac{1}{4}$ inches?

A. You can see the thickness.

(Testimony of Patrick L. Darcy.)

Q. Approximately $21\frac{1}{4}$ inches. Now, referring now, Mr. Darcy, to plaintiff's identification 45, will you state what it is?

A. That's one of the panels used for building these inside boxes or form cores. That's the one that has to have the ply-wood facing to make a slick finished wall on the inside.

Q. It is an inside panel? A. Yes.

Q. And what with reference to plaintiff's identifications 46, 47, and 48?

A. These are two panels off of another side of the same type of box.

Q. You're referring to 46 and 47?

A. 46 and 47; 48 is a discarded portion of one.

Q. Now, are those panels that were actually used on the [448] project?

A. Those were used on the project all the way through, until they had to be discarded for lack of use.

Mr. Olson: We offer plaintiff's identifications 45 through 48 in evidence.

Mr. Holman: Are those the ply-wood?

The Court: Do they all have ply-wood facing?

Q. The inside panels. These identifications 45 to 48 all contain plywood, do they not, Mr. Darcy?

A. Yes, they're all ply-wood faced.

Mr. Olson: All inside panels.

Mr. Holman: No objection, for the purpose of illustrating the witness' testimony, your Honor.

The Court: Admitted.

(Testimony of Patrick L. Darcy.)

(Whereupon, Plaintiff's Exhibit No. 45 for identification was admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 46 for identification was admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 47 for identification was admitted in evidence.

(Whereupon, Plaintiff's Exhibit No. 48 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, with reference to the outside panels, would they be likewise faced with plywood? [449] A. No, it wasn't necessary.

Q. So, what would be the—how would the outside panels, then, differ from Exhibits 45 to 48, as to materials you could make them of? I'm not asking as to size, but as to material?

A. Well, the same material, except the plywood facing.

Q. And why is there that difference?

A. Because the outside requires less of a smooth surface, where it is back-filled against it, it is not as particular as the inside, where the smooth flow of water is part of the design of hydraulics of the Bureau of Reclamation.

Q. Do the Bureau of Reclamation specifications call for plywood on the inside of the panel?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Now, I notice on plaintiff's Exhibit 45 that it is not apparently, one solid piece of plywood. Could you explain the reason for that, if any?

A. Well, as this edge shows here, the plywood had been bruised from use and re-use until it was beyond use to produce a smooth surface. It had to be removed and pieces patched in, because there was nothing to make new panels, as there should have been, until finally we had so many pieces so rough and edged off that they were beyond use at all. [450]

Q. Well, why did you do that, instead of making a new face for the panel, Mr. Darcy?

A. Because there was no plywood to make new faces for it.

Q. And what is the tin covering that is on the edge of these exhibits?

A. Well, these instances here we had to use a piece of plywood that had a smooth edge on one side, and then a piece of tin to cover the other edges with to produce a smooth surface over the wrecked edges where they come together.

Q. Now, with reference to the time that it would take to re-patch a panel as shown by these exhibits 45 to 48, how would that compare with the time element that would be involved to put a new entire piece of plywood over it?

A. Well, I'd say it would take at least three times as long to patch it up, on an average; some longer. I don't think it would take any less than three times that long.

(Testimony of Patrick L. Darcy.)

Mr. Olson: All right, would you return to the stand?

(Whereupon, album of photos taken on job 1062 and 1068 was marked Plaintiff's Exhibit No. 49 for identification.)

Q. Mr. Darcy, handing you plaintiff's identification number 49, I'll ask you to state what that is?

A. It is an album of pictures that were taken on the work [451] on project 1062 and 1068.

Q. And who took the pictures?

A. On the first page the Bureau of Reclamation took the pictures.

Q. All right, speaking of the first page, then, if the Bureau of Reclamation took those pictures, I'll ask you to state what each of those pictures are.

Mr. Holman: Well, just——

Q. It is just a picture of the mixer.

A. It was taken for the purpose of showing the equipment used on the job.

Mr. Hawkins: I move that be stricken, your Honor. It was taken by the Reclamation Bureau, and this witness is testifying what their purpose is.

The Court: It will be stricken.

Mr. Olson: I agree. I'm going to offer it just for the purpose of showing what this buggymobile is. I don't think there will be any objection to it.

Mr. Holman: We haven't seen it, Mr. Olson.

The Court: No, they haven't seen it.

Mr. Holman: Go ahead.

(Testimony of Patrick L. Darcy.)

Q. There's some notations under those pictures. Who made those notations? A. I did.

Q. And who assembled that album? [452]

A. I did.

Q. Are those, then, actual photographs taken of the physical properties shown on the different pictures, out on jobs 1062 and 1068? A. They are.

The Court: Let's see, was there any testimony as to who took the pictures, other than the first page?

Q. I don't think there was, your Honor. Who took the pictures outside of the ones on the first page, Mr. Darcy? I'm sorry, your Honor; I had understood that he had taken all of them, and perhaps he did not, some of them.

A. Page 5 is a reproduction of the four colored pictures previously admitted, and including all of the first four pages, with the exception of one picture, were taken by William E. Schaefer. The balance of it I took.

The Court: Did you say the first five pages, other than the one of the Bureau of Reclamation, were taken by William E. Schaefer?

A. Page 2, 3, 4, and 5, with the exception of one picture.

Q. Which picture do you except?

A. The one showing William E. Schaefer in the yard with the fellows.

Mr. Holman: I misunderstood. I thought he said except the first page, the first four pages were by [453] William E. Schaefer.

(Testimony of Patrick L. Darcy.)

The Court: 2, 3, 4 and 5 were by William E. Schaefer, except one picture.

Q. The one in the lower right was taken by another man? A. Right.

Q. Who took that picture?

A. I wouldn't know.

Q. Which page is that? A. Page 5.

Q. The rest you took?

A. With the exception of page 6, which is a reproduction of the colored pictures previously admitted, taken by M. C. Schaefer of the lumber, including one on page 7 of the same set.

The Court: What are those lumber pictures?

The Clerk: Plaintiff's 41.

Q. Now, what about the rest?

A. The rest of the pictures, then, I've taken.

The Court: Did he testify that the first page was a representation of equipment used by the plaintiff on this job? A. Yes.

Q. Are they, Mr. Darcy?

A. Yes, that's the equipment we used.

Q. Mr. William E. Schaefer is here. I'll show these to [454] counsel. If there is an objection as to properly identifying the first few pages, I would like to put Mr. Schaefer on for that purpose.

Mr. Hawkins: I object. I don't think the exhibit has been properly identified yet. There is no showing when they were taken.

The Court: That's right, there was no question of the date.

(Testimony of Patrick L. Darcy.)

Q. When were the pictures taken?

A. Each picture will speak for itself, if not on the picture itself, on the margin, or on the back of the picture.

Q. Well, can you tell me what year they were taken?

A. 1944 and '45, on the Roza Project, 1062 and 1068.

Q. And when with reference to the actual performance of the job itself?

A. Well, scattered along all the way through it, from beginning to end.

Q. Are there any notations in here, Mr. Darcy, that give the date each picture was taken?

The Court: He asked him if the notations under the pictures showed the dates of them. I anticipate there might be objection to the written matter there. I don't know; perhaps there won't be.

Mr. Hawkins: I would like to know when those pictures [455] were taken. I don't think any notations made on the book would be any evidence when they were taken.

Mr. Olson: The witness has testified when they were taken.

Mr. Hawkins: He testified they were taken from beginning to end. That's not sufficient.

Witness: Each picture has a date on the back side of it.

Mr. Hawkins: On the back side of it? They're all in the book.

(Testimony of Patrick L. Darcy.)

The Court: We'll recess for ten minutes. If counsel can't get together on whether these pictures can be admitted, then there will have to be further testimony, I suppose.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Mr. Hawkins: Your Honor, during recess I've examined this album, and I certainly object to the admission of it in evidence now. All the way through this book we find comments like this, beginning on the first page: "Excavation banks too close, and straight up." "Dirt dug close to underfoot, making all operations highly expensive."

The Court: It would be my view that any written [456] matter under the pictures would not be admissible. I think even if the witness wrote it it would be self-serving. Do you have anything to say, Mr. Olson?

Mr. Olson: No; my thought would be Mr. Darcy would testify to the same things, and that the only purpose of that would be explanatory to your Honor. I appreciate, your Honor, it is argumentative, and I also appreciate there are some things in there that are proper to the identification. I think it is very desirable to have it set up in book form, and if I can offer it to the exclusion of the written matter, or if it is deemed better to have it deleted with a black pencil, or taped over or something, I can then go through the album and have

(Testimony of Patrick L. Darcy.)

Mr. Darcy testify to what each structure, or what portion of the project it is, I think.

Mr. Hawkins: Just as a matter of policy, I don't like to have a document of this kind go into evidence with these repeated remarks of the same character, page after page. I realize the trial court has the picture in mind, but the appellate court would not; of course they would read what is under the picture; they would be bound to do that.

The Court: I think it is inadmissible unless it is possible to delete them or paste something over them.

Mr. Hawkins: These pictures are easily removable; [457] why not take them out?

Mr. Olson: We would have to delete it on the back, too. Does this other sheet have the same notation on the back?

Mr. Hawkins: I think if the witness testifies these are accurate representations of a particular spot at a particular time, I think they are admissible for what they are worth, but I certainly object to them going in in this form. It is not proper.

Mr. Holman: I join, your Honor.

The Court: Well, I don't know that an offer has been made, but I will indicate that the writing wouldn't be admissible, under the pictures or even on the back of the pictures.

Mr. Holman: I think the Clerk can take it off the back of the pictures, your Honor.

The Court: Is that in pencil?

Mr. Holman: For the most part.

(Testimony of Patrick L. Darcy.)

Mr. Olson: There's some notations on the back I don't think you have any objection to; the date the picture was taken, for instance. "Note very evident lack of two by fours; this space should be well filled;" I don't contend that is proper, your Honor.

The Court: I wonder if you could proceed with this witness on some other point, and then on the overnight [458] adjournment prepare your pictures and bring them back with the written matter erased on such as you want to use?

Mr. Olson: Well, I'm going to have to go over them again.

The Court: The Clerk says he has some heavy gum paper that could be pasted over the writing on the back.

The Clerk: Or on the front of it.

The Court: Well, we'd still have the difficulty there, unless the pictures were securely pasted into the album, and they're not, you would still have the writing on the back that could be read if anyone lifted it out and looked at it. I've been on an appellate court bench; I know that may likely happen, too.

Mr. Hawkins: I don't know that it would necessarily influence the Court; probably wouldn't, but at the same time, as a matter of policy, I don't like to have it.

Mr. Olson: I see counsel's position. Your Honor, I was going to take these pictures and go through them one by one, but I'll pass it for the time being.

(Testimony of Patrick L. Darcy.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, when you went on the project, that was August—what date, again?

A. That's when I took over superintendency of the job. [459]

Q. What date was that?

A. That was the 10th of August.

Q. When did you first go on the job?

A. The 29th of June, 1944.

Q. As I understand it, then, you were on the jobs from June 29; you were superintendent from August 10, '44?

A. That's right.

Q. Now, on June 29, when you went on the job, what was the situation with reference to the number of excavations, if any, that had then been made, if you know?

A. There were considerable rough excavations. A few were fine graded, supposedly.

Q. What do you mean by that?

A. The first thing we did when we went on the job was to start checking those excavations to see if they were right.

Q. And were they?

A. We found none; in two laterals we checked that day we found no excavations that had the right elevations and sub-grades.

Q. And what was the conditions with reference to the banks?

A. All approximately vertical.

(Testimony of Patrick L. Darcy.)

Q. Now, then, on August 10, 1944, approximately how many structures, if any, had been completed?

The Court: What was that last date, please?

Mr. Olson: August 10, 1944, when Mr. Darcy became superintendent.

A. About 70 had been completed, and four or five under construction.

Q. Four or five? A. Yes.

Q. Now, from that time on, as I understand it, you were in actual charge of the operations?

A. That's right.

Q. Now, would you explain, Mr. Darcy, what took place from then on with reference to your difficulties, if any, in the placing of structures in the excavations?

A. Well, every time we come to an excavation and started erecting a form for a structure we found the same hazard, the same thing wrong with all of them, from the beginning. The grades would be wrong, the banks would be too close; we would have to start the first thing in the hole to shovel out and make room to do the work of setting the forms, put the grades down to the proper elevation, some had to be cribbed and back-filled, where they had over-excavated; on neat cuts some neat cuts were off square; quite a few of the structures were off square, or off the lateral line. Occasionally we found one that was several feet from the center line of the lateral. Those and some of the worst ones we had to pass up. We [461] couldn't put any time on excavation on them. We only excavated on the ones

(Testimony of Patrick L. Darcy.)

that were the least bad, to be able to keep the crew doing something, to keep the crew from standing out in the desert all the time, and I would chase all over all the time hoping to find somebody responsible from Macri's operations to do that for us. Sometimes I couldn't find any, I had to let the carpenters go ahead and dig it out so they could keep them going.

Q. With reference to the finished or hand grading on these excavations, did you complain to Mr. Macri or his foreman about it?

A. A couple of times I complained directly to Mr. Macri, although I didn't see him very often. I usually put my complaints in to his superintendent.

Mr. Holman: For the purpose of the record I move that answer be stricken as immaterial, for the reason that the sub-contract provides if there is any delay or hazard caused by the principal contractor, he shall be given five days' notice and a chance to correct it.

The Court: It will be overruled.

Q. Would Macri and Company's men return—that question may be a little suggestive; Mr. Darcy, what would happen when you complained to Mr. Macri's men or his superintendent about the excavations?

Mr. Holman: Just a minute; can we have a time fixed, [462] and what men, and where? Is it general?

Mr. Olson: It is general. If I took each excavation—I can do it, but——

(Testimony of Patrick L. Darcy.)

The Court: I'll overrule the objection.

A. Well, if I found his superintendent, and give him any complaint, he always made an effort with what he had available to correct whatever was wrong. Usually he didn't have sufficient help to get it done immediately, but eventually he got somebody around to get it straightened out.

Q. Now, what I want to get at, Mr. Darcy, is the typical situation where your carpenters would come up to an excavation, as you related, and found the excavation not completed for the installation of the concrete structure, just what would be done, if anything?

A. The first thing they did was get their line from the hubs, their elevation, to check their grades, their center line, their head wall angles. If the excavation didn't correspond to what was required in the reference hub, then if it wasn't too badly off they'd start to work to dig the thing out, to make it right.

Q. And on those that were too badly off, as you put it, what would you do then?

A. Pass them up and call help from Macri's crew to come back and correct their work. [463]

Q. And did they come back when you requested them, on these occasions?

A. With very few exceptions he always got somebody back, when they could.

Q. And after they came back what was the situation then with reference to what you found?

(Testimony of Patrick L. Darcy.)

A. Sometimes the help they had understood sufficiently to be able to get the thing straightened out, and sometimes they didn't. After several occasions of having them come back three times on an excavation, one time four times, we finally went ahead and finished them out ourselves, a little bit of hand work to get them correct.

Q. How much, particularly with reference to man hours, or time, would your men and you spend on hand excavation on these excavations in order to install your forms?

A. Well, it would run from a half hour up to an instance of one hole had sixteen hours; it varied.

Q. I appreciate it would vary. This sixteen hours on one, that's one excavation out of many. How would they run generally, Mr. Darcy, if you can tell?

A. Oh, an average of between two and a half to four hours.

Q. Now, what is the situation with reference to excavations being completed ahead of you, to the extent that there were always holes to work on, for your men?

A. Well, it was rarely that we had enough holes ahead to set [464] forms in, without having corrections made to keep them going steady.

Q. And on the excavation as made by Macri and Company, what was the situation with reference to lateral clearance on the outside of the form or the structure to be installed; what was the lateral clearance?

(Testimony of Patrick L. Darcy.)

A. A foot or less on at least 95 per cent of all excavations.

Q. Did you say a foot or less? A. Yes.

Q. And are you referring to the bottom, or the top, or what part of the excavation?

A. At the bottom or the sub-grade, at the foot of the existing side banks, outside banks.

Q. And what was the situation as far as the top was concerned?

A. Very little slope; maybe two or three inches in an average outside bank.

Q. Now, with reference to the lumber, Mr. Darcy, was there lumber, or what was the situation with reference to the lumber that was supplied you by Macri and Company, both as to quality and as to the time that it was furnished you?

A. There was no lumber when I first went on the job. One thing that was wrong with the job was it wasn't moving when I went up there, because there was no lumber to finish setting or tying up forms, to put on strong-backs, [465] or placing it.

Q. What date was that?

A. That was the 29th of June, 1944. Approximately the 8th or 9th of July we got a small load of lumber, about 1500 feet of ship-lap and a few two by fours, and we did a little form setting with that; it didn't last long. It was fair grade. We repeated our request for lumber on an average of at least four times a week. Lumber was never there when we needed it, and we would be promised at least twice a week for sometimes six or seven weeks

(Testimony of Patrick L. Darcy.)

that we would be having a load of lumber within a few days, and it never came. One load of lumber that came in was tongue and groove, which will not work in with ship-lap without a lot of extra cost. We had to use it. We received one load of lumber about the middle of September, mixed lumber, used previously on some other job. As near as that type of stuff could be tallied, I tallied 4800 feet of it, a sample of which we have here. That's an average of the grade of the entire load of that delivery.

Mr. Holman: Pardon me, it's hard to hear you here. You said the entire load, or lot?

A. That is an average of the grade of the entire load of that delivery.

Q. Are you referring to plaintiff's Exhibit 29, which I am holding in my hand? [466]

A. That's it.

The Court: When was that delivery, did you say?

Q. When was that delivery?

A. That was made right close to the middle of September.

Q. Of 1944?

A. I would say—yes—I would say between the 10th and the 15th, pretty close.

Mr. Holman: I'm sorry, but just for some reason I can't get this witness on dates. I couldn't hear you.

A. Between the 10th and 15th of September, 1944.

Q. Now, when you would request additional lumber, would it always be furnished promptly?

A. Never.

(Testimony of Patrick L. Darcy.)

Q. What did you have to do, then, with reference to making your panels and forms?

A. Well, a lot of times, to keep operating, we had to dismantle panels that we had in the yard, that wouldn't be used for some little time, to make up panels that had to be had right away to keep the structures going in a sequence of operation. Then when we finally did get lumber we had to re-fit those panels, and some that they had to borrow the two by fours out of we had to completely rebuild. At times we had to go out and take the strong-backs out of forms just poured a few hours, and rush those ahead to tie up forms to receive concrete, due to [467] lack of two by fours.

Q. Now, in removing the panels from the structures in these vertical excavations, did you experience any difficulty with reference to removing those panels?

A. Always difficulty removing the panels from the outside.

Q. Was there any damage done to the panels in removing them?

A. Considerable damage done to practically all of them.

Q. And what did that necessitate, if anything?

A. Well, the panels had to be all hauled back to the yard, some of them re-built, pieces replaced on all of them, sometimes an edge would be broken off, usually on the deeper panels the bottom plate would be left in the ground, lost there, and afterwards it would have to be dug out with a shovel, to get the

(Testimony of Patrick L. Darcy.)

wood away from the structure. They all had to be hauled back to the yard and repaired or replaced.

Q. Mr. Darcy, how long, or over what period of time, assuming that you would have had excavations made and ready for you with a bank of a one to one slope, and with a lateral clearance of one foot at the foundation of the structure to the outside of the concrete portion of the structure, and lumber furnished of the proper quality and on time, how long a time would it take to have completed the concrete pouring operations on 1062?

Mr. Holman: Your Honor, I will object to that for [468] the purpose of the record on the ground that the hypothetical question contains elements that have not been supported by the evidence, and that it is immaterial anyway, under the terms of the contract and the sub-contract.

Mr. Ivy: I join in that objection.

The Court: Overruled.

A. I don't think it would have taken over three and a half months at the very outside, to have completed 1062.

Q. And if you could have been working on 1068 at the same time, how long would it have taken you under the same set of facts to have completed both projects?

Mr. Holman: The same objection, your Honor, plus the objection that it is not shown that they had the equipment to handle two jobs at once. It has not been shown here.

The Court: Overruled.

(Testimony of Patrick L. Darcy.)

A. Six months would be plenty of time to have completed both projects, operating simultaneously.

Q. Did you complete the concrete work with reference to structures on 1062? A. Yes.

Q. And on what date?

A. Do you mean the last concrete that was poured, or the stripping and finishing? [469]

Q. No, I'm talking about the completion of the project itself.

A. The 7th day of April, 1945.

Q. Now, what was the situation, Mr. Darcy, with reference to where Mr. Macri's men were working on the excavating and your carpenters and men were working on the concrete structures, as to how far ahead Macri's men were from your men, throughout the job?

A. With very few exceptions they were always in sight, right immediately in front of us, and when they had corrections to make, called back to correct an excavation where we were working, innumerable times they were working in the same excavation with our carpenters. They worked on one side of the hole and the carpenters on the other side, to keep things going both ways.

Q. And there's been testimony about a chute and a spillway or spilling pool——

A. That's "stilling pool."

Q. Thank you; what part of the project was that?

A. That was the turbine lateral system.

Q. Was it the first part of the project?

A. It was in the center of it.

(Testimony of Patrick L. Darcy.)

Q. Center of it; with reference to the latter part of the project, or the end of the project, Mr. Darcy, where were Mr. Macri's excavating men with reference to Concrete [470] Construction Company's men, on the completion of the project?

A. Our last structure that we built outside of the chute, we had fine graders working cutting the sub-wall trenches, removing excavated dirt from underneath our steel that was placed in the floor, for the floor slab; they were working right in the carpenters' way, removing that dirt, and on the chute, right to the time the chute was set, we had their fine graders digging out for that chute-way so those forms could be set and have the right clearance underneath.

Q. I was asking about this chute; I thought you told me it was in the center of the project?

A. It is mid-way in the project, but it was our last work.

Q. You're talking about location, when you say the center part, then? A. Right.

Q. I was talking about time; that's what threw me off. Then this chute and stilling pool was, with reference to time, what part of your work?

A. It was the last of the work we did on the project.

Q. You say Mr. Macri's men were doing their fine grading and fine excavating right with you?

A. Yes.

Q. Were there any roads—let me ask you this; what was the [471] road situation on the project?

(Testimony of Patrick L. Darcy.)

A. Outside of county roads, there were very few even small pieces of anything resembling a road.

Q. Well, did Macri and Company build any roads?

A. A few spots where they couldn't navigate themselves they fixed some semblance of a road.

Q. Mr. Darcy, do you remember my reading from one of the field reports of Mr. Reynolds to the effect that the carpenters standing around fires, or did I read from that?

A. Yes, I heard it; I think he read it himself.

Q. I thought there was only three or four of those, your Honor. Right now when I'm trying to, I can't find my notes on which one that is. Here it is. Referring to defendant Macri Exhibit 13-m, the field inspector's report under date of January 20, 1945, under remarks; "Carpenters standing around fires hours at a time (as usual) waiting for materials, weir, flumes, boxes, and so forth; also finishing structure then not knowing where to go"; did that situation—it seems to be followed by "Where's Mr. Darcy"; did that situation exist there on the project, Mr. Darcy?

A. It did during the month of January and part of February.

Q. And what was the reason for it?

A. We had practically every piece of form material that we [472] had made set in the field, ready for pouring concrete. We had a crew, no material. Our request for further material to complete set-

(Testimony of Patrick L. Darcy.)

ting forms was refused until we had poured up on what we had set, and could move those ahead.

Q. Referring to the same exhibit, Mr. Reynolds' field report under date of January 20, 1945 "Five carpenters lost around two and a half hours that I know of, waiting for materials to be hauled from yard. The carpenters off in afternoon." Were there materials at the yard at that time, waiting to be hauled out?

A. They were waiting for a Macri truck to go down to 1068 to bring the material back to the yard so it could be prepared to take it out to the field. Nothing to do in the meantime until that material was returned.

Mr. Olson: Now, subject to those pictures, your Honor, counsel may examine.

The Court: Yes, it will be understood that you may recall the witness if you wish to further identify these pictures and offer them. You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Darcy, who had preceded you as superintendent?

A. For Concrete Construction Company?

Q. Yes, on the job? A. Mr. Fred Waltie.

Q. Fred Waltie; and did you also succeed, or were you followed by Mr. Schaefer as superintendent?

A. Mr. Schaefer was the general superintendent.

